APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2247

ATKINSON TRADING COMPANY, INC.,
A NEW MEXICO CORPORATION,
Plaintiff-Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN; ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION; STEVEN C. BEGAY, DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-97-1261-BB)

William J. Darling (Margaret P. Armijo with him on the briefs) of William J. Darling & Associates, P.A., Albuquerque, New Mexico, for Plaintiff-Appellant.

Marcelino R. Gomez, Assistant Attorney General (Herb Yazzie, Attorney General of the Navajo Nation Department of Justice, with him on the brief), Window Rock, Navajo Nation (AZ), for Defendants-Appellees.

Before EBEL, McKAY, and BRISCOE, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff-Appellant is a non-Indian New Mexico corporation operating several businesses–including a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and RV park-on property held in fee simple but completely surrounded by Navajo Nation Reservation trust lands. This case involves Appellant's challenge to a Hotel Occupancy Tax enacted by the Navajo Nation, Navajo Nation Code tit 24, §§ 101-142 (1995), requiring persons (Appellant's guests in this case) to pay an eight percent tax on any room or space costing two dollars or more each day in a hotel which is located within the exterior boundaries of the Navajo Nation.[1] *Id.* at §§ 102-103. Appellant initiated its complaint against the tribe in 1993 in a declaratory judgment action brought in the United States District Court for the District of New Mexico. *See Atkinson Trading Co. v. Navajo Nation*, 866 F.Supp. 506, 507 (D.N.M. 1994). The court in that case dismissed the action without prejudice requiring that Appellant exhaust its remedies in the tribal system. *See id.* at 512-13. After receiving an adverse result in the Navajo tribal system,[2] Appellant again brought a declaratory judgment

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[1] We note that when Appellant first brought its challenge in 1993, the rate of the tax was five percent. As originally enacted in 1992, the Hotel Occupancy Tax assessed five percent of the price paid for a room but provided that "[o]n January 1, 1994, the rate of the tax imposed by this chapter will increase to eight percent." Navajo Nation Code tit. 24, § 103 (1995).

While the tax applies only to Appellant's guests, it requires that Appellant collect the tax, *see id.* §§ 104, 107, and provides a reimbursement for the costs of collecting. *See id.* § 109.

[2] The Navajo tribal code provides for appeal from the assessment of the Hotel Occupancy Tax. The prescribed procedure requires a first appeal to the Navajo Tax Commission and permits a second appeal to the Navajo Supreme Court which is empowered to affirm, reverse, remand, or modify a Commission action. *See* Navajo Nation Code tit. 24, § 131(A)-(B)

action in the district court requesting a ruling that the Navajo Nation has no jurisdiction to impose its Hotel Occupancy Tax on Appellant's guests. *See Atkinson Trading Co. v. Gorman et al.*, No. 97-1261 BB/LFG (D.N.M. Aug. 21, 1998); R., Vol. III at 913. Appellant moved for trial de novo and summary judgment. The district court denied Appellant's motions and granted instead Appellees' cross-motion for summary judgment. *See id.* Appellant now appeals the district court's rulings. We exercise jurisdiction under 28 U.S.C. § 1291.

I.

As a preliminary matter, we consider the district court's denial of Appellant's motion for trial de novo. Appellant argues that it should have received a new trial in the district court because the factual findings established in Appellant's appeal to the Navajo tribal system were not supported by the evidence and because the Navajo Supreme Court demonstrated bias in its proceedings. The standard of review for a district court's refusal to grant a new trial is abuse of discretion. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997).

The district court applied the standard set forth in *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996), to Appellant's declaratory judgment action. In *Mustang*, we adopted the reasoning of the Ninth Circuit from *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), and held that "when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and

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(1995). The Commission concluded that Appellant was subject to the provisions of the tax, *See* R., Vol. I at 404, and the Supreme Court also ruled against Appellant, affirming the decision of the Commission. *See* R., Vol. II at 705.

conclusions of law de novo." *Mustang*, 94 F.3d at 1384. Appellant complains that our holding was too deferential to decisions of tribal courts and argues that *Mustang* is no longer good law in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Appellant's Br. at 36. Appellant asserts that *Strate* overruled the reasoning of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and, by implication, the reasoning of *Mustang* and *FMC*. *See* Appellant's Br. at 36.

Strate, however, reiterated the holding of *National Farmers Union* and specifically upheld its reasoning. In *National Farmers Union*, a Montana school district and its insurer brought an action in federal district court challenging a tribal court's assertion of jurisdiction over a personal injury action initiated against the school district on behalf of an Indian minor. The Supreme Court ruled that federal courts have the authority to determine whether a tribal court has exceeded the limits of its jurisdiction, *National Farmers Union*, 471 U.S. at 853, but the Court instructed federal courts to follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court. *Id.* at 856-57. The *National Farmers Union* exhaustion rule allows a party to challenge in federal court a tribal court's assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system. The Supreme Court explained the policy behind the rule: "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856 (footnotes omitted). The Court reasoned that the rule would encourage tribal courts to explain "the precise basis for accepting jurisdiction" and "provide other courts with the benefit of their expertise . . . in

the event of further judicial review." *Id.* at 857. The exhaustion rule would also promote "the orderly administration of justice . . . [that] will be served by allowing a full record to be developed in the Tribal Court" and would minimize the risks of a "procedural nightmare" like the one then before the Court. *Id.* at 856.[3] Referring to policy considerations like these, our circuit adopted the *Mustang* standard of review for decisions of tribal courts. We find nothing in *Strate* to persuade us that the Supreme Court has changed the exhaustion rule or abandoned the reasoning behind it. We therefore conclude that we need not reexamine our decision in *Mustang*.

At issue in *Strate* was "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members." *Strate*, 520 U.S. at 442. The petitioners in *Strate* wanted the Court to distinguish *Montana v. United States*, 450 U.S. 544 (1981), and extend the holding of *National Farmers Union* to establish a sweeping boundless form of tribal jurisdiction over disputes involving nonmembers. *See Strate*, 520 U.S. at 447. The Court declined to extend *National Farmers Union*, concluding instead that *National Farmers Union* and *Montana* were completely compatible. *See id.* at 448. *Montana*, the Court explained, addressed the larger "concept of 'inherent sovereignty'" and the bounds of tribal power which were at issue in *Strate*. *Id.* at 453 (quoting *Montana*, 450 U.S. at 563). The *National Farmers Union* decision and its deferential rule did "not expand or stand apart from *Montana*'s instruction on 'the inherent sovereign powers of an Indian tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 565). The *Strate* Court set

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[3] For a complete explanation of the "procedural nightmare" that developed, *see National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 560 F. Supp. 213, 213-18 (D. Mont. 1983), reversed 736 F.2d 1320 (9th Cir. 1984), and *National Farmers Union*, 471 U.S. at 847-49.

forth a general proposition that was "unremarkable" for the purposes of its holding but is actually central to the discussion at hand, that is, "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Id.* at 453 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (alterations in original). Deference lies at the heart of the standard of review established in *Mustang*. Even the *Strate* Court recognized the deference that federal courts owe tribal courts. Significantly, *Strate* left intact the deferential reasoning of *National Farmers Union* and, by implication, the rationale of *FMC* and *Mustang*.

FMC and *Mustang* set forth a clearly erroneous standard of review for factual questions decided by the tribal courts. That standard is built upon the "traditional judicial policy of respecting the factfinding ability of the court of first instance," *FMC*, 905 F.2d at 1313, a policy with theoretical underpinnings similar to those articulated by the Supreme Court in *National Farmers Union*. *See, e.g., National Farmers Union*, 471 U.S. at 856 ("[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."). The standard of review set forth in *FMC* and *Mustang* is *de novo* for questions of law decided in the tribal system. On that point, the *FMC* and *Mustang* courts expected that tribal courts would provide others "with the benefit of their expertise . . . in the event of further judicial review." *National Farmers Union*, 471 U.S. at 857; *see also FMC*, 905 F.2d at 1313-14. This standard "indicates that federal courts have no obligation to follow [the tribal courts'] expertise, but need only be guided by it." *FMC*, 905 F.2d at 1314. The rationale underlying the *FMC* and *Mustang* standards of review for factual and legal questions decided by the tribal courts still persuades us. We conclude

that *Mustang* is still good law and that the district court in this case did not err in applying the *Mustang* standard to the decisions of the Navajo Supreme Court and Navajo Tax Commission.

Appellant asserts that even if the *Mustang* standard is still good law the district court erred in its application of that standard because it did not apply the *Mustang* exception for unfair and biased Indian tribunals.[4] Appellant argues in particular that the district court should have reviewed the factual findings of the Navajo Supreme Court *de novo* because the statements and findings expressed by the tribal court illustrate the pervasive bias Appellant faced in the Navajo Nation's tribunal system. Appellant's Br. at 39-43. Appellant is primarily concerned with: (1) the Navajo Supreme Court's use of the term "lure" to suggest that Appellant improperly used "Navajo trappings" to attract tourists; (2) the court's unnecessary criticism of the congressional policy behind the General Allotment Act of 1887; and (3) the court's unfounded speculation as to why Appellant ceased hiring Navajos and buying wares from Navajo artisans shortly after it commenced this challenge to the Hotel Occupancy Tax. *See* R., Vol. II at 681-82, 684-85, 699. The district court treated these portions of the opinion as merely erroneous statements of the evidence – ignorable, refutable, and irrelevant as to whether the Hotel Occupancy Tax can be imposed upon Appellant's non-Indian customers.[5]

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[4] Though *Mustang* did not speak to this exception explicitly, it is not difficult to extrapolate from our court's opinion that if a nonmember party exhausting its remedies within the tribal system faces a fundamental unfairness or bias against it, the district court ought not give clear error discretion to the tribal court's findings of facts in its review of the tribal court's decision. *See Mustang*, 94 F.3d at 1384.

[5] With respect to the negative statements regarding the General Allotment Act and congressional policy surrounding it, the district court

See R., Vol. III at 915. The district court concluded that "even accepting [Appellant's] contention that the [Navajo Supreme Court's] opinion makes some erroneous statements of fact that are not supported by the evidence," it "does not come close to exhibiting the type of bias that would justify applying a different standard of review to the tribal court's decision." *Id.* at 916-17. Further, the district court noted that Appellant did not "contest any of the essential facts found by the [Navajo Tax Commission] and relied on by the [Navajo] Supreme Court" and determined there was "no need for a *de novo* trial that would afford [Appellant] a second opportunity to contradict facts that it did not contest in the first proceeding." *Id.* at 916. Based on our review of the record, including the opinion of the Navajo Supreme Court, we cannot say that the district court abused its discretion in failing to apply the *Mustang* exception for unfair and biased Indian tribunals and in denying Appellant's motion for a new trial.

II.

We turn now to Appellant's primary contention—that the district court erred in granting Appellee's motion for summary judgment.[6] "We review the grant or denial of summary judgment *de novo*, applying the same standards as the district court." *Habermehl v. Potter*, 153 F.3d 1137, 1138 (10th Cir. 1998).

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pointed out that those were "no more than restatements of a view held by many Indian and non-Indian scholars."

R., Vol. III at 916.

[6] Appellant also contends that the district court erred in denying its motion for summary judgment. For reasons that will become apparent in our discussion of the district court's grant of Appellee's motion for summary judgment, we need not consider the court's denial of Appellant's motion.

The district court ruled that the tribe's authority to impose the tax on Appellant's hotel guests who were not tribal members arose from the guests' consensual relationship with the tribe.[7] The consensual relationship basis for tribal jurisdiction is an exception to a general rule limiting tribal jurisdiction over nonmembers; both the rule and the exception are detailed in *Montana*, 450 U.S. at 564-66. In reaching its decision, the district court determined: (1) that the hotel guests staying at Appellant's hotel had entered into a consensual relationship with the tribe; (2) the relationship entered into was relevantly related to the tax in question; and (3) the tax was not a disproportionate burden on Appellant's guests. Appellant argues that it is *Montana*'s rule that must apply and not its exception and that the district court erred in "creat[ing] a test that is different from that set forth in *Montana* and *Strate*." Appellant's Br. at 8. Because the primary dispute is whether the standard applied in this case is consistent with that set forth in *Montana* and *Strate*, we turn to this issue first.

A.

In *Montana*, the Supreme Court addressed the extent to which a tribe could exercise civil authority over non-Indians on lands owned in fee by non-Indians but located within the bounds of the tribe's reservation. *See Montana*, 450 U.S. at 547. The Court in that case held that the tribe could not prohibit non-Indians from hunting or fishing on fee lands within its reservation because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. Continuing with its holding, however, the *Montana* Court noted, "To be sure, Indian tribes retain inherent sovereign power to exercise some

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[7] The Navajo Supreme Court came to the same conclusion in its consideration of Appellant's action. *See* R., Vol. II at 701.

forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* The Court then set out two exceptions in which a tribe could exercise jurisdiction over non-Indians on its reservation. The first exception articulated by the Court permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on their reservations when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. In *Strate*, the Supreme Court applied the *Montana* rule of inherent sovereignty and held that a tribal court could not entertain a claim between nonmembers arising out of an accident occurring on a public highway that ran through reservation land because the petitioners failed to show their claim qualified under one of *Montana*'s two exceptions. *Strate,* 520 U.S. at 456-59. *Strate* recognized both the *Montana* rule and its exceptions, and it is the latest example illustrating that a proper *Montana* analysis includes a discussion of whether one of the exceptions applies.

It is significant that we review the *Montana* standard in its entirety as we begin our disposition of this case. Importantly, a full understanding of the application of *Montana*'s exceptions requires special emphasis of the Court's own phrase that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added). This phrase confirms that tribes may exercise their powers over nonmembers on non-Indian fee lands and clearly undermines the argument that the tribe lacks jurisdiction over Appellant's nonmember guests because Appellant's hotel is situated on fee land within the

reservation. The explicit caveat for tribal jurisdiction over nonmembers even on non-Indian fee lands demonstrates that the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation.

The district court in the case at hand observed that "[i]n both *Montana* and *Strate*, the Supreme Court mentioned the tribes' right to tax certain activities as a matter of inherent sovereign power" but "limit[ed] this power by imposing conditions on it." R., Vol. III at 924. Because the Supreme Court had consistently included taxation in its discussion of the consensual relationship exception to the *Montana* rule, the district court determined to analyze the Navajo tribe's taxing authority under that exception.[8] In its application of the consensual relationship analysis from *Montana*, *Strate*, and other Supreme Court cases involving tribal authority of nonmembers on the reservation, the district court also reviewed *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which addressed the scope of tribal taxing powers.

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[8] The district court did not rule out the possibility that the power to tax might arise from the second "significant-impacts" exception to the *Montana* rule. In fact, the Navajo Supreme Court held as much, concluding that "[t]axation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." R., Vol. II at 702. The district court appeared to condone the Navajo Supreme Court's conclusion, stating that "[c]onsideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax." R., Vol. III at 927 n.4. In our review of the district court's opinion in this case, however, the applicability of the second exception to the *Montana* rule is not at issue. We therefore do not address its application to the Navajo Hotel Occupancy Tax.

In *Merrion*, the Supreme Court upheld an oil and gas severance tax imposed on non-Indian lessees extracting oil and natural gas from reservation deposits. The Court reasoned that the lessees ought to be subject to the tribe's taxes because they "avail[ed] themselves of the 'substantial privilege of carrying on business' on the reservation" and "benefit[ted] from the provision of police protection and other governmental services, as well as from '"the advantages of a civilized society"' that are assured by the existence of tribal government." *Id.* at 137-38 (citations omitted). The Court recognized that a tribe's power to tax "is an essential attribute of Indian sovereignty . . . [and a] necessary instrument of self-government and territorial management." *Id.* at 137. The Court explained further that a "tribe's interest in levying taxes on nonmembers to raise 'revenues for essential government programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Id.* at 138 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)). In its review of *Merrion* in this case, the district court acknowledged that *Merrion* involved tribal, and not fee, lands on the reservation. The district court concluded, however, that *Merrion*'s discussion was not necessarily limited to cases involving tribal lands because the Supreme Court characterized the tribe's authority to tax non-Indians doing business on the reservation as "an essential attribute of sovereignty" and not merely an extension of a tribe's power to exclude persons from its tribal lands. R., Vol. III at 924-25. Because the instant case involved a tax on commercial activity within reservation boundaries and because that tax was designed to sustain the tribe's services in support of the tourist market, the district court determined that the provision-of-services and benefits-of-a-civilized-society factors in *Merrion* would be relevant to its *Montana* consensual relationship analysis.

The district court also reviewed several other Supreme Court cases demonstrating the complexity of a proper *Montana* analysis, including *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Colville*, 447 U.S. at 156. In *Brendale*, a majority of Supreme Court justices recognized that a tribe's interest in zoning fee lands within a reservation became stronger as the impact of fee land activity on the tribe increased. *See Brendale*, 492 U.S. at 430-31 (opinion of White, J.), 437 & n.2 (opinion of Stevens, J.). In *Cotton Petroleum*, 490 U.S. at 186 & n.17, and *Colville*, 447 U.S. at 156, the Court considered the effects and burdens of state and tribal taxes, discussed the relationship between those taxes and the services provided by the tribe, and directed that lower courts seek to accommodate tribal, state, and federal interests in their analyses of tribal self-government and taxing issues.[9]

After reviewing *Montana*, *Strate*, *Merrion*, and the Supreme Court's other Indian jurisdiction case law, the district court determined that "the real question with respect to tribal-taxation cases and the consensual-relationships test is whether the nonmembers' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity." R., Vol. III at 925. The district court described the test in such cases as "a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of

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[9] The district court also referenced *Cohen's Handbook of Federal Indian Law* which characterized the *Montana* and *Colville* holdings as "recogniz[ing] that tribal power can extend to activities of nonmembers on fee lands [within the reservation] but only if there is a tribal interest sufficient to justify tribal regulation." Felix S. Cohen, Handbook of Federal Indian Law 256 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

jurisdiction." *Id.* at 926. As applied by the district court, that balancing test required an examination of "the nature of the relationship between [Appellant's] guests and the Tribe[] and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the [Hotel Occupancy Tax]." *Id.* We are convinced that the district court did not apply a standard to the Navajo Nation's Hotel Occupancy Tax that was different from the one set forth in *Montana*. We believe the balancing test and the factors discussed by the district court in its consensual relationship analysis appropriately apply and complement the Supreme Court's Indian law jurisprudence.

The district court did not discuss, however, what may be the most significant case illustrating the consensual relationship exception as it relates to tribal taxation of non-Indians on fee land-*Buster v. Wright*, 135 F. 947 (8th Cir. 1905). The Supreme Court cited *Buster*, an early Court of Appeals decision, in both *Montana* and *Strate* to illustrate a case in which a tribe may legitimately exercise its inherent sovereign powers to tax the activities of nonmembers who enter consensual relationships with the tribe, even those occurring on non-Indian fee land within the reservation. *See Montana*, 450 U.S. at 566; *Strate*, 520 U.S. at 457. The consensual relationship holding in *Buster* involved merchants and traders who were deemed liable to pay taxes for exercising a taxable privilege—that of conducting business within the boundaries of the Creek Nation. *See Buster*, 135 F. at 949-50, 953-54. The relationship was consensual because the nonmember business owners could "refrain from the [privilege] and . . . [therefore] remain[] free from liability for the [tax]." *Id.* at 949. In its reasoning, the *Buster* court considered the fee status of the land belonging to those nonmember business owners, but, more importantly, the court "place[d] clearly before our minds the character of the Creek

Nation and the nature of the power which it [was] attempting to exercise." *Id.* at 950. In the process of weighing the two positions (those of the nonmember business owners and the tribe), the court held that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." *Id.* at 952.

The Eighth Circuit upheld the tax at issue in *Buster* because the tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders" is "one of the inherent and essential attributes of its original sovereignty." *Buster*, 135 F. at 950. The fact that the business owners within the borders of the Creek Nation owned their land in fee and the fact that the business transactions took place on fee land did not exempt the noncitizens from Indian jurisdiction. The court wrote that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.* at 951. It held that "the legal right to purchase land within an Indian nation gives the purchaser no right of exemption from the laws of such nation" and that "merchants and traders who had purchased or were occupying such lots were liable to pay the permit taxes of the tribe." *Id.* at 953-54.

Our review of *Buster* is significant because that case, with its explicit approval by the Supreme Court, clearly rebuts Appellant's primary argument that *Montana*, *Brendale*, *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strate*, and *Merrion* should be read to establish one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*). The Supreme Court's use of *Buster* demonstrates that there is nothing inappropriate in reading those cases in harmony rather than cacophony.

The contrary reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and

results detached from the reasoning of the Court. In the decisions noted above, the Court did make an issue of the fee status of the land in question. But nothing in them suggested that fee status is a limitation on the power to tax. The cases adverse to tribal jurisdiction merely prohibited either the exclusive restrictions on the use of the land itself or the use of lex loci to establish Indian jurisdiction over a tort case between two nonmember parties that was otherwise unrelated to tribal interests. In *Brendale*, for example, the Yakima Tribe sought to enforce its tribal zoning ordinance upon nonmember fee land even though the tribe's ordinance conflicted with a county zoning ordinance covering the same property. *See Brendale*, 492 U.S. at 416. Reliance on one *Brendale* majority's conclusion that the Yakima Tribe "lacked authority to zone nonmembers' fee land within an area of the reservation open to the general public," *See* Dis. Op. at 8, overlooks the conclusion of a differently comprised *Brendale* majority holding that the Yakima Tribe could, in fact, impose its zoning regulation upon nonmember fee land in the area of the reservation closed to the general public. *See Brendale*, 492 U.S at 441-44 (opinion of Stevens, J.), 468 (opinion of Blackmun, J.). The comprehensive holding of *Brendale* demonstrates again how fee status is simply one factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe but not the determining factor. In *Bourland*, the Cheyenne River Sioux Tribe sought to prohibit hunters not holding tribal licenses from hunting on non-trust lands within the reservation. *See Bourland*, 508 U.S. at 685. The Supreme Court held that the treaty rights on which the tribe relied to assert exclusive jurisdiction had been abrogated. However, the *Bourland* Court left for resolution on remand the issue as to whether a *Montana* exception could be invoked to give the tribe jurisdiction over non-Indians on non-trust lands within the reservation. *See id.* at 695-96. In *Montana* itself, the Court considered only the tribe's authority

to prohibit all hunting and fishing by nonmembers on non-Indian property within reservation boundaries, and not the power to tax. *See Montana*, 450 U.S. at 547. While the *Strate* case did not involve the direct regulation of the use of nonmember fee land, the tribal court of the Three Affiliated Tribes in that case sought to assert jurisdiction over a tort claim between a nonmember plaintiff and nonmember defendants solely because the tort occurred within the boundaries of the reservation. *See Strate*, 520 U.S. at 447. The *Strate* Court distinguished its result from *Buster* by contrasting the nature of the consensual relationships that existed in the two cases; it did not distinguish the two cases with any reference to fee status. *See id.* at 457.

We acknowledge that the results in all four of these cases were adverse to the interests of Indian tribal jurisdiction. We believe, however, that the analysis set forth in these cases and others can be more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations. This case-by-case approach seems clearly to have been the result the *Montana* Court intended when it held on the one hand that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," but on the other hand that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added).

Even in cases that were resolved favorably for the tribes, the Supreme Court did not indicate that its decision turned on the point of trust land status. In *Merrion*, for example, the Court ruled that the tribe had the authority to tax transactions occurring on trust land in part because those transactions "'significantly involv[ed]'" the tribe and its members and because "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-

government and territorial management [which] . . . enables a tribal government to raise revenues for its essential services." *Merrion*, 455 U.S. at 137 (discussing the holding in *Colville*, 447 U.S. at 152). In *Colville*, the Supreme Court upheld a cigarette tax imposed on non-Indian customers purchasing cigarettes on trust lands and used *Buster* (which involved transactions between tribal nonmembers occurring on fee lands) to note how "[f]ederal courts . . . have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." *Colville*, 447 U.S. at 153 (citing *Buster*, 135 F. at 950).

The direction provided by Congress on the issue also indicates a tribal jurisdiction standard that is not based on a distinction between fee and tribal lands. In 1948, Congress enacted 18 U.S.C. § 1151 which defined "Indian Country," and therefore the boundaries of Indian tribal jurisdiction, to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Although this definition was codified in the context of a primarily criminal statute, our circuit has held that "Indian tribes have jurisdiction over lands that are Indian country" and that § 1151, which defines Indian country, "applies to civil jurisdiction as well [as criminal jurisdiction]." *Mustang*, 94 F.3d at 1385 (citing *DeCoteau*, 420 U.S. at 427 n.2). In a 1962 case, the Supreme Court held that the enactment of § 1151 "squarely put to rest" the issue of whether land owned in fee fell outside tribal jurisdiction. *Seymour v. Superintendent of Wash. State Pen.*, 368 U.S. 351, 357 (1962); *see also Hagen v. Utah*, 510 U.S. 399, 425-26 (1994) (Blackmun, J., dissenting) (noting that as a result of 18 U.S.C. § 1151, "[r]eservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction"); *United States v. Baker*, 894 F.2d 1144, 1149 (10th Cir. 1990) (quoting *Seymour* to settle the issue "whether private property

owned by non-Indians but situated within the boundaries of an Indian reservation is still 'Indian country' for jurisdictional purposes"). For this reason, the "chain of events that led to Appellant's land falling within the exterior boundaries of the [Navajo] Nation's reservation," Dis. Op. at 1, is essentially irrelevant. The key issue is the fact that the land is, without dispute, in Indian Country. Rather than support Appellant's artificial dichotomy, § 1151 clearly precludes it. There is simply no authority for the position that the timing of a fee patent makes any difference in designating land on the reservation as Indian Country. To the contrary, Congress, in the exercise of its plenary authority, has determined that all lands within the outer bounds of the reservation are within Indian Country and are therefore subject to reasonable tribal authority.[10]

Because the issue is settled as to whether fee lands within the exterior boundaries of the reservation fall under the jurisdiction of the tribe, the only issue involved in this case is whether the tribe's jurisdictional powers include the right to impose the tax at issue on nonmembers lodging on Appellant's fee lands. Because the power to tax derives from the inherent powers of the tribe, not from the tribe's power to exclude, the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the

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[10] In fact, the *Montana* Court indicated that its decision to deny the Crow Tribe power to regulate hunting and fishing on fee lands within the reservation might have been different had the statute at issue incorporated a reference to § 1151. The Court stated, "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians [in its statute that prohibited unauthorized hunting, trapping, or fishing on tribal lands, 18 U.S.C. § 1165], it could have easily have done so by incorporating in § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151." *Montana*, 450 U.S. at 563.

reservation falls within the civil jurisdiction of the tribe.[11] *Cf., e.g., Brendale*, 492 U.S. at 432, 441 (invalidating the tribe's assertion of exclusive zoning authority over fee lands in the "open" portion of the reservation because the proposed development in that area "d[id] not imperil any interest of the Yakima Nation," but granting the tribe exclusive zoning authority over fee lands within the "closed" portion of the reservation–i.e., that portion of the reservation closed to the general public—because the proposed development would endanger economically important timber production and threaten cultural and spiritual values of unique and undeveloped character of land). *Buster* and *Merrion* use similar language and similar analysis in their consideration of tribal taxing powers on activity taking place on fee lands and tribal lands, demonstrating the soundness of the district court's conclusion in this case: "[T]he extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction." R., Vol. III at 926.

Contrary to the dissent's suggestion, *See* Dis. Op. at 9, the Supreme Court in *Montana* did not circumscribe the significance of its citation to *Buster* (with a parenthetical

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[11] The dissent mistakenly asserts that our opinion "concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land." Dis. Op. at 6. Our position is not that fee status is irrelevant. Fee status is largely inconsequential in this case simply because the Navajo Hotel Occupancy tax is not a severe imposition upon Appellant's guests and because the subject matter of the tax was more a commercial transaction than one affecting the actual use of Appellant's land. In sum, fee status is plainly relevant in applying the *Montana* standard and its exceptions, but it is not determinative to the extent that the analysis of the Supreme Court turns on that point alone.

phrase, for example). The mere fact that the Court cited to page 950 of the *Buster* decision in no way implies that it did not approve of language from 951 of *Buster* holding that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Buster*, 135 F. at 951. The latter language is simply part of the same discussion that the *Buster* court began on page 950 to "place clearly before our minds the character of the Creek Nation and the nature of the power which it is attempting to exercise." *Id.* at 950.

In *Strate*, the Supreme Court made *Buster*'s applicability abundantly clear by including parentheticals to explain its use of *Buster* and other cases to "indicate[] the type of activities the Court [in *Montana*] had in mind" when it expounded the first exception to the *Montana* rule. *Strate*, 520 U.S. at 457. The parenthetical in *Strate* explains that the *Buster* court "up[held] [the] Tribe's permit tax on nonmembers for the privilege of conducting business within [the] Tribe's borders" and "characterized as 'inherent' the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders.'" *Id.* By pointing out both the consensual relationship between the tribe and nonmembers and the inherent qualities of a tribe's authority to tax in its use of *Buster* to illustrate the first exception to the *Montana* rule, the Supreme Court in *Strate* refutes the dissent's suggestion that *Buster* is applicable only to illustrate what constitutes a consensual relationship. Furthermore, the dissent fails to explain how *Strate* or other Supreme Court cases limit the authority at issue in *Buster* which the Court described as "inherent"the authority "to prescribe the terms of business within its borders." *Id.*

Appellant attempts to distinguish *Buster* by arguing that the Creek Nation imposed its tax on nonmembers two years before the tribe "lost its unlimited sovereign power to regulate the conduct of nonmembers within its territory."

Appellant's Reply Br. at 7. We reject this characterization of *Buster*. While the Creek Nation did enter into an agreement with the United States in 1901 to permit nonmembers to purchase lots within its territory, *see Buster*, 135 F. at 951, that agreement did not compromise the tribe's sovereignty. The Court in *Buster* noted, "The theory that the consent . . . to the conveyance of the title to lots or lands within [the tribal territory] . . . exempts the . . . owners or occupants of such lots from the exercise of all [the tribe's] governmental powers . . . is too unique or anomalous to invoke assent." *Id.* at 952.

In additional attempts to distinguish this case from *Buster*, Appellant argues that in *Buster* "the non-members doing business within the Creek territory had actually purchased the land on which they were doing business directly from the tribe" and "the non-members had been aware of the tax and expressly agreed to it when purchasing their property." Appellant's Reply Br. at 7-8. These arguments do not provide any grounds for distinguishing the case at hand, however. In response to the first point, we acknowledge that the nonmembers in *Buster* did purchase their lots directly from the Creek Nation upon approval by the Secretary of the Interior, whereas Appellant's land was granted to Appellant's predecessor by the United States government. While Appellant might plausibly construe these facts to argue that in *Buster* the nonmembers "were in the tribe's territory with the express permission of the tribe," *Id.* at 8, the difference is insignificant. The critical facts in *Buster* were that the nonmember businesses were located within the boundaries of the Creek Nation and had entered into a consensual relationship with the tribe by exercising the taxable privilege of trading within those boundaries. As we stated above, Congress extinguished any distinction we might draw between *Buster* and the case at hand first, in 1934 when it extended the boundaries of the Navajo reservation by congressional act to include Appellant's fee land, Act of June

14, 1934, ch. 521, 48 Stat. 960-62 (1934), and again, in 1948 when it defined Indian country to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 18 U.S.C. § 1151; *see also Seymour*, 368 U.S. at 357. For legal purposes, the nonmembers in *Buster* and the Appellant in this case are identically situated on fee l and within the boundaries of the tribe's reservation.

Appellant's second point is more plainly mistaken. To support its contention that the nonmembers in *Buster* had been aware of the tax and expressly agreed to it when purchasing their property, Appellant cites *Buster*, 135 F. at 954. In that portion of the opinion, the court did discuss "contracting parties" who were aware of the tax before entering an express agreement on that point. *Id.* The parties spoken of, however, are not the nonmember businessmen and the tribe. Rather, they are the United States and the Creek Nation. *See id.* The agreement mentioned is the agreement of 1901 between the United States and the Creek Nation that opened the way for nonmembers to purchase fee lots, not an agreement between any individual nonmember merchant and the tribe. *See id.* The dissent appears to perpetuate this error by presuming that "the consensual relationship in *Buster* was formed when the nonmembers purchased tribal land and/or when they chose to transact business with the tribe and its members." Dis. Op. at 9 n.1. It is important to note, however, that the *Buster* court made no mention of any particular agreement, contract, or choice entered into by the nonmember businessmen constituting an express consensual relationship. In fact, the only description of the consensual relationship given in *Buster* is that "[t]he payment of this tax is a mere condition of the exercise of th[e] privilege [of trading within the borders of the Creek Nation]." *Buster*, 135 F. at 949. The *Buster* court noted that "[n]o noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. . . .

[The tax] has the optional feature of [a license] and lacks the compulsory attribute of [an ordinary tax]." *Id.* Indeed, the only mention of explicit consent in *Buster* was that the tribe did not forfeit their sovereign powers over nonmembers on fee land within its borders by consenting to incorporate cities and otherwise convey lots to those nonmembers. *See id.* at 952.

Buster's discussion of tribal sovereign powers is really no different from the Supreme Court's discussion in *Montana* and elsewhere. In 1831, the Supreme Court declared Indian people's status as "domestic, dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Since that time, the tribes have remained distinct political entities, retaining their original sovereign authority to the extent Congress and the Supreme Court have permitted. *See Montana*, 450 U.S. at 565 (reviewing Supreme Court case law that stresses "that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns"); *Buster*, 135 F. at 950. This case is not distinguishable from *Buster* on the grounds that the tax in *Buster* was imposed in a time of unlimited sovereign powers. Tribal sovereign powers have always had some limitation. The issue here is what those limits are, i.e., whether the Navajo Nation may impose its tax on the non-Indian guests visiting Appellant's hotel situated on fee land within the boundaries of the Navajo Reservation.

Montana and *Strate* mandate that we permit the Navajo Nation to tax Appellant's guests if the tax falls within the consensual relationship exception. Significantly, both cases cite *Buster* to illustrate the consensual relationship exception. *See Montana*, 450 U.S. at 566; *Strate*, 520 U.S. at 457. We are persuaded that the district court's analysis conforms to the Supreme Court's decisions in *Montana*, *Strate*, and *Merrion*, and is consistent with its citations of *Buster*.

Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard and leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible. The primary considerations that the Supreme Court has taken into account in cases involving tribal jurisdiction and nonmembers on the reservation are (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary. We therefore conclude that the district court was correct in applying the consensual relationship exception to the Navajo Nation's Hotel Occupancy Tax as applied to Appellant and its guests.[12] A review of the record as it

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[12] Appellant argues that because the Hotel Occupancy Tax requires both Appellant and its guests to take certain actions, the Navajo Nation must establish jurisdiction over both Appellant and its guests. *See* Appellant's Br. at 15. While the Navajo Supreme Court held that under *Montana* the tribe had the authority both to impose its Hotel Occupancy Tax on Appellant's non-Indian guests and to require that Appellant collect and remit the tax, *see* R., Vol. II at 705, the district court applied its *Montana* rule analysis as if the only issue were the Nation's assertion of jurisdiction over Appellant's hotel guests. *See* R., Vol. III at 920, 929. The question is not really as significant as Appellant suggests. The district court found that the Nation had authority to impose the tax on the guests under the *Montana* consensual relationship test. We note simply that if there is a sufficient consensual relationship between the Nation and Appellant's guests, there is certainly a sufficient consensual relationship between the Nation and Appellant, which, as a corporation operating several businesses on the reservation, has a consensual relationship more explicit than its guests, benefits far more from the provision-of-services and benefits-of-a-civilized-society factors discussed by the district court,

supports the district court's application of facts to the three factors it derived from its *Montana* analysis will help illustrate our conclusion in this regard.

B.

Appellant argues that even if the district court's review of the *Montana* rule and its exceptions were correct, the court erred in its application of the consensual relationship exception. More particularly, Appellant contends that the district court erred in concluding that a consensual relationship existed between the tribe and the hotel guests and in basing that conclusion at least partially on the grounds that the hotel guests drive on a public highway that passes over reservation land to reach Appellant's businesses on fee land within the reservation. *See* Appellant's Br. at 22, 24. Appellant's arguments are again mistaken.

The district court did consider in its consensual relationship analysis the fact that Appellant's guests travel by public highway onto the reservation in their visit to Appellant's establishments (also known as the Trading Post). R., Vol. III at 917, 927. If that were the only factor the district court took into consideration when making its determination, its conclusion would probably be foreclosed

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and is actually reimbursed for the costs of collecting the tax. *See* Navajo Nation Code tit. 24, § 109 (1995).

The district court did question the extent to which Appellant had standing to challenge the Hotel Occupancy Tax, noting that Appellant's standing was "not entirely clear." R., Vol. III at 919. The court reasoned, however, that because the Navajo Nation failed to raise the issue, it failed to give Appellant opportunity to establish standing in the factual record, and the court did not address the issue further. *Id.* at 919-20. Because the Navajo Nation requires Appellant to collect the tax and because those most affected are Appellant's guests, we have no reason to suppose that Appellant lacks standing.

by the Supreme Court's holding in *Strate*. *See Strate*, 520 U.S. at 442 (holding that a tribal court may not entertain an action against a nonmember arising out of an accident occurring on a portion of a public highway that runs across the tribe's reservation). The district court, however, addressed several more significant aspects of the guests' relationship with the tribe. It discussed the extent of police, fire, emergency medical, and tourist services provided by the tribe to benefit Appellant and its guests at the Trading Post.[13]

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[13] Reviewing the Navajo Tax Commission's factual findings, the district court reported:

> Plaintiff's customers travel on reservation land to reach the Trading Post, either on a federal highway or a state highway. These highways pass over rights-of-way granted by the Tribe. The highways are jointly patrolled by the Arizona state, and Navajo tribal, police, but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. A substation of the Tribe's Tuba City police department is located in Cameron [the town in which Appellant's Trading Post is located]. When a 911 call is placed from the Post, the call is referred to the tribal police for first response. In addition, the Post has an alarm system that triggers calls to the tribal police. That is, when the alarm goes off, the operator of the alarm system calls the tribal police, rather than a non-tribal law enforcement office, to request a response. The Trading Post has a non-loitering policy, and tribal police enforce that policy by requiring juveniles and others that are "hanging out" to move off the Post's property. Tribal police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires.
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> Fire protection in the area of the Trading Post is provided jointly by the tribal fire department in Tuba City, located about 25 miles from Cameron; the Bureau of Indian Affairs ("BIA") fire department (also located in Tuba City); a fire department called the Timberline department that is located 45 miles from Cameron; and the Grand Canyon fire department, located over 50 miles from Cameron. The tribal and BIA departments cooperate closely with each other, and provide the primary response to calls from the Cameron area. There has been at least one fire at the

It ruled that by frequenting Appellant's businesses on the reservation, staying overnight, and otherwise taking advantage of tribal services and the "establishment of a civilized society" on the reservation, those subject to the Navajo Hotel Occupancy Tax had actually entered into a consensual relationship with the tribe. *See* R., Vol. III at 927. In support of its ruling, the district court cited an analogy from New Mexico state law in which motorists driving in New Mexico are deemed to have given implied consent to breath tests for alcohol. *Id.* (citing N.M. Stat. Ann. § 66-8-107 (Michie 1998)). While it does not address directly the issue of implied consent, the court could also have cited New Mexico Statutes Annotated § 3-38-15 (Michie 1999 Supp.), which authorizes municipalities in New Mexico to impose an occupancy tax for revenues on lodging within their municipality in part because "[e]very vendor who is furnishing any lodgings within a municipality or county is

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Trading Post, to which the tribal fire department as well as the Timberline department responded.

Emergency medical services in the Cameron area are provided by a tribal entity called the Emergency Medical Services Department ("EMS"). EMS maintains two ambulances in Tuba City. EMS responds to all calls from locations within the Navajo Nation, and has responded to numerous calls concerning automobile accidents in the Cameron area. The tribal police and fire departments have also received and responded to many auto accident calls in the area, involving both Navajos and non-Navajos. If the state police called Flagstaff emergency services instead of the tribal EMS, however, the Flagstaff unit would respond to the call.

The Navajo Nation has a tourism department that provides information to prospective visitors over the telephone or through brochures. That department is also attempting to stimulate tourism by developing "vendor villages" in several locations on the reservation that receive heavy tourist use, including the Cameron area.

R., Vol. III at 917-19 (footnote omitted); *see also* R., Vol. I at 393, 397-401 (the Navajo Tax Commission's findings of fact).

exercising a taxable privilege." The state of Arizona (where Appellant's Trading Post is located) also levies a "transaction privilege tax" on transient lodging. Ariz. Rev. Stat. §§ 42-5008, -5010, -5070 (1999). The occupancy taxes authorized in Ariz. Rev. Stat. § 42-5010 and N.M. Stat. Ann. § 3-38-15 are applied to lodgers within Arizona and New Mexico municipalities in the same manner as the Navajo Hotel Occupancy Tax applies to Appellant's lodgers on the Navajo Reservation.

The Navajo Nation in the case at hand is taxing the guests of Appellant's hotel for the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe. By enacting its Hotel Occupancy Tax, the Navajo Nation seeks to prescribe the terms of business between hotel owners and guests within its tribal borders. *Cf. Strate*, 520 U.S. at 457 (affirming *Buster*'s holding that "the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders" was "'inherent"'). The consensual relationship between the guests and the tribe is one of implied consent, or privilege and tax, similar to that set forth in *Buster*: the consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax. *Cf. Buster*, 135 F. at 949.

The district court's ruling with regard to the consensual relationship between the tribe and the hotel guests subject to the Hotel Occupancy Tax does not offend the *Montana* consensual relationship exception or other notions of justice. The *Montana* exception contemplates the fact that "commercial dealing . . . or other arrangements" may give rise to tribal jurisdiction under the consensual relationship exception. *Montana*, 450 U.S. at 565. In the case before us, the tribe accommodates the activity of Appellant and its

guests on the reservation. That activity is relevantly related to the tribe's tax. We agree with the district court that, by making the trip to the reservation and staying overnight, "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel. . . . In sum, the Tribe provides [Appellant's] overnight guests with the 'benefits of civilized society' while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services." R., Vol. III at 927-28.

We conclude that the same principles apply as in those other cases in which hotel occupancy taxes have been subject to judicial review. *See* Noralyn O. Harlow, Annotation, Tax on *Hotel-Motel Room Occupancy*, 58 A.L.R.4th 274, 282 ("Hotel room occupancy taxes have been subject to a number of constitutional challenges which, with a few exceptions, have been rebuffed in the courts."). As long as it does not appear that the hotel occupancy tax imposed by the tribe is an "arbitrary or capricious . . . exercise[] of legislative power" and as long as the "benefits received and the burdens imposed [are not] disproportionate," *Id.* at 290-91, 297, a court may infer that by availing themselves of the services provided by the tribe, hotel occupants like those in this case enter into a consensual relationship with the tribe. *See id.* (reviewing cases holding that the imposition of a hotel occupancy tax does not "discriminate against nonresidents and therefore [does] not violate the equal protection clause of the Constitution" and is not an arbitrary or capricious exercise of legislative power so long as the benefits received and the burdens imposed are proportionate).

In the final step of its analysis, the district court considered "the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the [Hotel Occupancy Tax]." R., Vol. III at 926. The court determined the burdens

of the Navajo Nation's tax were "minimal" because "[u]nlike zoning restrictions or hunting and fishing regulations, which directly restrict nonmembers' ability to act or use their property in certain ways, the [Hotel Occupancy Tax] involves only the payment of a tax of 8% of the room rate." *Id.* at 928. In its discussion of zoning, fishing, and hunting regulations, the district court distinguished this case from the factual scenarios of *Montana*, which involved a tribe's attempt to prohibit the hunting and fishing by nonmembers on fee land within the reservation, *See Montana*, 450 U.S. at 566, and *Brendale*, which involved a tribe's attempt to impose exclusive zoning authority over fee lands within "closed" and "open" portions of the reservation. *See Brendale*, 492 U.S. at 432, 441. We agree with the district court's analysis and hold that this tax is neither an arbitrary and capricious exercise of power nor a disproportionate burden on those paying the tax. *See id.* at 290-91.[14]

In the one case discussed in the A.L.R. report above in which a court found that the burden was disproportionate, a county had imposed an occupancy tax on all hotels in the surrounding municipalities to fund a city convention center. The court found that "the class taxed are afforded no benefits whatsoever, while being significantly burdened." *Allegheny County v. Monzo*, 500 A.2d 1096, 1104 (Pa. 1985). This is not so in the case at hand. The Navajo Hotel Occupancy Tax "is imposed for the purposes of promoting tourism and tourism development," a benefit to Appellant and its guests,

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[14] While several cases use various nomenclature to describe the precise nature of the tax in question, we do not find it necessary to construe the Navajo Hotel Occupancy Tax for purposes of our holding. *Cf.* Harlow, *supra*, 58 A.L.R.4th at 282 (noting that "[t]he variety of nomenclature reflects an equally diverse judicial view of the nature of the tax, which has been held under various circumstances to be a sales tax . . . a privilege tax . . . a license tax . . . an income tax . . . or an excise tax").

and "to develop projects throughout the Navajo Nation." Navajo Nation Code tit. 24, § 142(A)-(B). The district court noted that "the rate [of the Navajo Hotel Occupancy Tax] is lower than the occupancy-tax rate imposed by many municipalities"[15] and observed that Appellant "made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe." R., Vol. III at 928. We are again persuaded by the district court's analysis. The burden imposed on Appellant's guests is not disproportionate to the benefits they receive by availing themselves of Navajo tribal services, including tourist services. The Navajo Nation's tax is imposed on nonmembers who have entered an implied consensual relationship with the tribe and is used in ways that appropriately benefit the taxpayers.

We hold that as applied to Appellant's guests, the Navajo Hotel Occupancy Tax falls under the consensual relationship exception of the *Montana* rule. The district court's rulings are AFFIRMED.

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[15] The district court appears to have made this conclusion based on a review of occupancy tax rates outside the states of New Mexico and Arizona. The statute authorizing municipalities in New Mexico to impose an occupancy tax limits that tax to "five percent of the gross taxable rent." N.M. Stat. Ann. § 3-38-15 (Michie 1999 Supp.). Arizona levies a five and one-half percent tax on transient lodging. *See* Ariz. Rev. Stat. § 42-5010(A)(2) (1999). Statutes in other states, however, authorize occupancy taxes at rates varying between one and fifteen percent. *See, e.g.*, La. Rev. Stat. Ann. § 2740.18 (A)(1) (West 1999) (authorizing parishes to impose a one percent occupancy tax); Tex. Tax Code Ann. § 351.0025(b) (authorizing an occupancy tax up to fifteen percent of price paid for room) (West 1999); Vt. Stat. Ann. tit. 32, § 9242(c) (1998) (levying a tax of nine percent on occupancies in the state); Va. Code Ann. § 58.1-3819 (Lexis 1999) (authorizing more populated counties to impose an occupancy tax of up to five percent).

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. For the reasons outlined below, I conclude the Navajo Indian Nation lacks authority to impose the challenged Hotel Occupancy Tax on Appellant's non-Indian guests, and would reverse and remand with directions to enter judgment in favor of Appellant.

I.

Although the majority has recited a few of the historical facts giving rise to this dispute, it has downplayed the chain of events that led to Appellant's land falling within the exterior boundaries of the Nation's reservation. Further, the majority has largely ignored the tribal court proceedings that preceded the filing of this case. I begin by providing additional relevant facts on these points.

Appellant is a New Mexico corporation with its principal place of business in Gallup, New Mexico. Appellant owns certain real property (the Property) in or near Cameron, Arizona (specifically described as Lots 2, 3, and 4 of Section 22, Township 29 North, Range 9 East of the Gila and Salt River Base and Meridian, Coconino County, Arizona). Appellant holds title to the Property in fee simple, and its title can be traced directly to a patent issued by the United States government. One of Appellant's predecessors in title (Hubert Richardson) began business operations on the Property in 1916. Appellant currently operates several businesses on the Property, including a hotel, restaurant, cafeteria, gallery, curio shop, store, and RV park (the businesses are collectively known as the Cameron Trading Post).

The Nation is an Indian tribe with its reservation located in portions of Arizona, New Mexico, and Utah. In 1934, Congress extended the Nation's reservation and, from that point forward, the Property has been surrounded on all sides by the reservation. *See* Act of June 17, 1934, 48 Stat. 960. Thus, customers of Appellant's businesses, including guests

of its hotel, must travel through the reservation via U.S. Highway 89 and Arizona Highway 64 (both of which are maintained by the State of Arizona) to reach the Property.

On July 30, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT), 24 N.T.C. §§ 700-741, with an effective date of January 1, 1993. The HOT imposes a tax on all persons who pay for the use or possession of a room or space costing $2.00 or more per day in any hotel within the exterior boundaries of the Navajo Reservation. Owners and operators of hotels within the exterior boundaries of the Navajo Reservation are required to collect the tax from their guests, transmit the funds to the Navajo Tax Commission (NTC), and file reports with the NTC. The tax proceeds are allegedly "used to promote tourism and develop tourism-related projects in the Navajo Nation." App. Vol. II, at 680.

On August 27, 1993, Appellant filed an action in the United States District Court for the District of New Mexico, seeking a declaratory judgment prohibiting application of the HOT to its hotel operation in Cameron, Arizona. That action was dismissed without prejudice on June 17, 1994, due to Appellant's failure to exhaust available remedies within the administrative and judicial systems of the Navajo Nation. *Atkinson Trading Co. v. Navajo Nation*, 866 F.Supp. 506 (D. N.M. 1994). Appellant did not appeal that ruling.

On July 22, 1994, Appellant began its trek through the Navajo Nation administrative and judicial systems by submitting a letter to the NTC objecting to application of the tax to rooms rented by Appellant on its property and requesting a refund "of all monies paid . . . pursuant to this Tax." App., Vol. 1, at 1. On September 20, 1994, Ronnye Etcitty, the Executive Director of the NTC, rejected Appellant's request. *Id.* at 4-6. In the letter, Etcitty cited the following reasons why the challenged tax was applicable to Appellant's guests:

> [Appellant] employs at least thirty-five tribal members in its operations at Cameron. [Appellant] purchases Navajo made arts and crafts from members of the Navajo Nation. [Appellant's] operations are significant users of water in the Cameron area. The Navajo Nation government provides police protection, fire protection and other governmental services to the residents and visitors of the area. The Court system of the Navajo Nation is available to [Appellant] to resolve disputes. The advantages of a civilized society are assured by the existence of the Navajo Nation government.

Id. at 4-5. Etcitty's decision was subsequently affirmed by the NTC by a "Conference Decision" dated September 28, 1994. *Id.* at 7.

Appellant filed a notice of appeal from the NTC's decision. *Id.* at 8. On July 24 and 25, 1995, the Navajo Nation Office of Hearing and Appeals held a hearing on Appellant's appeal, at which time both Appellant and the Executive Director of the NTC presented witness testimony and other evidence. *Id.* at 107-392. On November 16, 1995, the NTC issued a written order concluding that Appellant was "subject to the Navajo Hotel Occupancy Tax laws for taxable periods commencing January 1, 1993, and [wa]s properly charged with the collection and remittance of the tax to the Office of the Executive Director of the Navajo Tax Commission." *Id.* at 404. In support of its conclusion, the NTC noted that (1) Appellant benefited from the governmental services provided generally to all persons within the exterior boundaries of the reservation, (2) Appellant's activities and those of its guests had a direct effect on the political integrity, economic security, or health and welfare of the Navajo Nation because the Navajo Nation police, fire, and emergency service units had responded to emergency and non-emergency situations at or near the Property, and (3) the fact that Appellant had previously been

determined by the Ninth Circuit to be an Indian trader "within the meaning of the applicable federal statute create[d] a presumption that its activities ha[d] a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation." *Id.* at 402. The NTC did not make any findings or reach any conclusions concerning whether a consensual relationship existed between the Nation and Appellant's non-Indian guests.

Appellant appealed the NTC's judgment to the Supreme Court of the Navajo Nation. On August 22, 1997, the Navajo Supreme Court affirmed the NTC's decision. The details of that decision will be discussed below. Appellant subsequently filed this action in the United States District Court for the District of New Mexico. After allowing the parties to file cross-motions for summary judgment, the district court entered judgment in favor of defendants, essentially affirming the decision of the Navajo Supreme Court.

II.

It is true that this case arrives before us in the context of the district court's grant of summary judgment. It must be remembered, however, that the district court's ultimate task was to review the Navajo Supreme Court's determination regarding tribal jurisdiction. *See Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996) (reviewing tribal court's decision regarding tribal jurisdiction to impose severance tax on oil and gas produced from lands allotted to individual tribal members). For purposes of this appeal, our task is identical to that of the district court: we must determine whether the Navajo Supreme Court was correct in concluding that the Nation acted within its authority when it imposed the challenged tax. *Id.* In doing so, we review the tribal court's conclusions of law de novo, and any underlying factual findings for clear error. *Id.*

III.

Because this case involves the Nation's authority to regulate the conduct of nonmembers on alienated, non-Indian land within the boundaries of the reservation, it is clear that the analytical framework outlined in *Montana v. United States*, 450 U.S. 544 (1981), and reaffirmed in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), is the proper one to apply. Under that framework, we must first determine whether any applicable treaties or federal statutes afford the tribe such authority. If no such treaties or statutes exist, the tribe is presumed not to have civil authority over the nonmembers unless one of the two exceptions outlined in *Montana* is found to exist. Under these two exceptions, a tribe has "inherent sovereign power to exercise some forms of civil jurisdiction over" nonmembers if (1) the nonmembers have in any way entered into a consensual relationship with the tribe through commercial dealing, contracts, leases, or other arrangements, or (2) the nonmembers' conduct on fee land within the reservation has threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Strate*, 520 U.S. at 446.

Although the majority purports to apply the *Montana* framework, it makes several major missteps in doing so. To begin with, the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land. *See* Maj. Op. at 31 ("Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard . . . ."). A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant. Both cases involved nonmember conduct on nonmember fee land. At issue in *Montana* was the "power of the [Crow Tribe of Montana] to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." 450 U.S. at 557. In *Strate*, the question was whether tribal

courts could "entertain claims against nonmembers arising out of accidents on state highways" running through Indian reservations. 520 U.S. at 442. Although these factual circumstances compelled the Court to utilize the above-outlined framework to resolve both cases, the Court indicated in both instances that its analysis would be different if the nonmember conduct had occurred on tribal land. For example, in *Montana*, the Court "readily agree[d]" with the lower court's holding "that the Tribe [could] prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. Likewise, in *Strate*, the Court noted "that tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 454. Further, before applying the *Montana* framework, the Court took great pains to establish that the land at issue was functionally equivalent to "land alienated to non-Indians," *Id.* at 456, and it emphasized that the outcome of its *Montana* analysis had no bearing "on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 442.

Any doubts on this point are negated when one considers the Court's other post-*Montana* cases. In 1982, less than a year after *Montana* was issued, the Court decided *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), involving the authority of the Jicarilla Apache Tribe to impose an oil and natural gas severance tax on nonmembers who had entered into long-term mineral leases of tribal land. With no mention of the *Montana* framework, the Court upheld the Tribe's taxing power as an inherent attribute of tribal sovereignty. In doing so, the Court noted "that '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.'" *Id.* at 137 (quoting *Washington v. Confederated*

Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980)) (emphasis added).

In 1989 and 1993, the Court returned to the *Montana* framework to decide, in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), the Yakima Indian Nation's authority to zone nonmembers' land within the reservation, and, in *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Cheyenne River Sioux Tribe's authority to regulate hunting and fishing by non-Indians in an area located within the reservation but acquired by the United States for the operation of a dam and reservoir. In *Brendale*, a majority concluded that the Yakima Indian Nation lacked authority to zone nonmembers' fee land within an area of the reservation open to the general public. 492 U.S. at 423-24 (opinion of White, J.); *Id.* at 444-45 (opinion of Stevens, J.). In *Bourland*, the Court noted "that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." 508 U.S. at 689. "The abrogation of this greater right," the Court indicated, likewise "implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* Under the facts before it, the Court concluded that when Congress acquired certain tribal land for the dam and reservoir project, it "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.*

Ignoring these Supreme Court cases, the majority here relies on two unconvincing sources. First, the majority cites language from *Buster v. Wright*, 138 F. 947, 951 (8th Cir. 1905), stating that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." Although it is true that *Buster* was cited in *Montana* and *Strate*, the Court's purpose in both instances was to provide an example of the first *Montana* exception relating to nonmembers who enter consensual

relationships with a tribe.[16] 520 U.S. at 457; 450 U.S. at 566. In neither case did the Court approve of the language now relied upon by the majority. Indeed, it is clear from *Montana*, *Strate*, and the other post-*Montana* cases cited above that the quoted language from *Buster* is not an accurate statement of current federal law.[17] The second authority cited by the majority is 18 U.S.C. § 1151, which defines the term "Indian Country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." Although this definition is often relied upon in determining "the allocation of federal, tribal and state authority with respect to Indians and Indian lands," *Indian Country U.S.A. Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), it has little, if any, bearing on tribal jurisdiction over nonmembers occurring on nonmember fee land within the boundaries of a reservation. For example, in *Strate*, the Court held that rights-of-way, which are specifically included in § 1151's definition of "Indian country," are to be treated (at least where a tribe has not retained the right to exercise dominion or control over the right-of-way) as non-Indian land for purposes of determining a tribe's civil authority over non-Indians' conduct occurring thereon. Further, in *Montana*, the Court acknowledged the existence of § 1151, but obviously rejected it as a statutory source of tribal jurisdiction over non-Indians on fee-patented lands. *See* 450 U.S. at 562.

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[16] Presumably, the consensual relationship in *Buster* was formed when the nonmembers purchased tribal land and/or when they chose to transact business with the tribe and its members.

[17] The decision in *Buster* was also discussed in *Merrion*. 455 U.S. at 143. That discussion pointed out that a tribe's taxing authority does not derive solely from its power to exclude non-Indians from tribal lands. Nothing in this discussion undermines the distinction, recognized in *Montana* and *Strate*, between tribal land and fee land for purposes of determining tribal jurisdiction over nonmembers.

Based upon its mistaken conclusion that there is no distinction between fee land and tribal land for purposes of determining tribal jurisdiction over nonmembers, the majority in this case proceeds to modify the *Montana* framework with factors derived in large part from *Merrion*. In particular, the majority adopts and applies what it describes as a "balancing test" in which "'the impact of the [nonmembers'] activity on the tribe [is balanced] with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.'" Maj. Op. at 25-26 (quoting R. Vol. III at 926). Among the key factors considered by the test are whether the tribe provides services to the nonmembers and whether the nonmembers otherwise benefit from "the advantages of a civilized society that are assured by the existence of [the] tribal government." *Merrion*, 455 U.S. at 137-38 (internal quotations and citations omitted).

In my view, it is improper to modify the *Montana* framework with any language or "factors" derived from *Merrion*. *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land. Only in those limited circumstances where a nonmember has entered into a consensual relationship with the tribe or its members, or where a nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," does a tribe possess inherent sovereign authority "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation . . . ." 450 U.S. at 566; *see also Strate*, 520 U.S. at 446 ("*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers or non-Indian land within a reservation, subject to two exceptions . . . ."). In contrast, *Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers'

conduct occurring on tribal land, and thus contains no particular "test" or "factors" for deciding tribal jurisdiction. The majority's newly adopted test, which effectively blends the two cases, subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember.

IV.

Because the majority has not, in my view, properly applied the *Montana* framework in deciding whether the Nation had authority to impose the HOT on Appellant's non-Indian guests, I proceed to do so.

Existence of treaty or statute affording the Nation authority over Appellant's guests

Although the Nation has never expressly relied on any treaty or federal statute to support its alleged authority to regulate Appellant's non-Indian guests, the Navajo Supreme Court concluded that the 1868 Navajo Treaty, 15 Stat. 667 (June 1, 1868), afforded the Nation "sovereign authority over the exterior boundaries of its territory -then and now." App., Vol. II at 685. The Navajo Supreme Court also suggested that this treaty afforded the Nation the authority to exclude Appellant's non-Indian guests from passing through the reservation to reach Appellant's property. *Id.* at 688, n. 8. Finally, the Navajo Supreme Court concluded that the federal Indian country statute, 18 U.S.C. § 1151 et seq., is "the measure of tribal civil authority." *Id.* at 687.

The Navajo Supreme Court's conclusions regarding the 1868 Treaty are clearly undercut by *Montana*. In *Montana*, the Supreme Court emphasized "that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 560. Although the record in this case does not indicate precisely when the patent

for the Property was issued, it appears to be undisputed that it occurred after the 1868 Navajo Treaty was enacted. Thus, the Treaty cannot be read as a statement of Congressional intent affording the Nation authority to regulate conduct occurring on the Property.

Likewise, the fact that the 1868 Treaty may have originally afforded the Nation the right to exclude non-Indians from traveling through the reservation does not, over 130 years later, afford the Nation any authority over Appellant's non-Indian guests. It is uncontroverted that Appellant's guests travel through the reservation via U.S. Highway 89 and Arizona Highway 64, both of which are maintained by the State of Arizona, to reach the property. Like the highway at issue in *Strate*, both of these highways presumably represent rights-of-way granted by the Nation, and there is no evidence in the record that the Nation retained any right to exercise dominion or control over those highways. Accordingly, under *Strate*, the highways must be treated as non-Indian property for purposes of determining the Nation's regulatory authority over Appellant's non-Indian guests.

Finally, contrary to the conclusion reached by the Navajo Supreme Court, the Indian country statute does not provide Indian tribes with any civil authority over non-Indians on fee patent land. As previously explained, although fee patent land falls within the definition of the term "Indian country," nothing in that statute grants tribes authority over non-Indians' conduct on such land.

In conclusion, I find no treaty or federal statute that affords the Nation civil authority over Appellant's non-member guests.[18]

Accordingly, I proceed to determine whether either of the two *Montana* exceptions applies.

Consensual relationship between the Nation and Appellant's guests

As previously stated, the first exception set forth in *Montana* to permit the Nation's exercise of civil authority over Appellant's non-member guests can arise out of a consensual relationship between the Nation and Appellant's guests. Although the Nation does not point to any consensual relationship between itself and Appellant's non-Indian guests,[19] the Navajo Supreme Court concluded that such a relationship existed. The Navajo Supreme Court based its finding on the following factors: (1) Appellant had "availed itself of the substantial privilege of carrying on business within Navajo Nation jurisdiction," (2) Appellant "uses a Navajo Indian environment, including culture, Navajo employees, crafts, and other Navajo Indian trappings, to lure tourists to its facility for business purposes," (3) "[w]hile on [Appellant's] property, the [non-Indian] tourists are served by

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[18] The Nation has not argued, nor do I find, that any grant of regulatory authority can be derived from the fact that Congress enlarged the reservation in 1934 to completely surround Appellant's fee land.

[19] Like the majority, the Nation relies heavily on the Court's decision in *Merrion*, and asserts that it possesses inherent sovereign power to tax all conduct occurring within the geographical boundaries of the reservation, including the conduct of Appellant's non-Indian guests. Under *Montana*, however, it is clear that a tribe's inherent sovereign power to exercise civil jurisdiction over nonmember conduct occurring on nonmember fee land is strictly limited to situations in which one of the two *Montana* exceptions is found to exist. 450 U.S. at 565-66.

Navajo employees, who make up a majority of [Appellant's] work force, to provide a distinctly Navajo flavor," (4) "[s]uppliers enter and drive across the Navajo Nation to bring [Appellant] and its guests goods," (5) Appellant had "purchased arts and crafts from Navajo tribal members and sales have been made to tribal members," (6) Appellant and its non-Indian guests "receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government," including police and fire protection, medical services, health protection, and tourism services. App. at 699-701.

In my view, at least half of these factors are irrelevant. Because it is uncontroverted that the legal incidence of the HOT falls on Appellant's guests, it is the relationship between those guests and the Nation that is important, not the relationship between Appellant and the Nation. Thus, even assuming, arguendo, there is some type of consensual relationship between Appellant and the Nation, that does not afford the Nation authority over Appellant's guests. I therefore discount entirely the first, second, and fifth factors relied upon by the Navajo Supreme Court.

The evidence in the record does support the third factor cited by the Navajo Supreme Court. Specifically, the evidence indicates that the majority (75 to 80 percent) of Appellant's employees are members of the Nation, and that Appellant's non-Indian guests are routinely served by this group of employees.[20] *See* App., Vol. I at 191, 398. In my view, however, these facts in no way give rise to a consensual relationship between Appellant's non-Indian guests and the

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[20] According to the record, Appellant's non-Indian guests do not, while on Appellant's property, transact business with tribal members not employed by Appellant. App., Vol. I at 130.

Nation. It is a basic principle of agency law that a servant acting within the scope of his or her employment does so on behalf of the master. *See* Restatement (Second) of Agency §§ 1, 2 (1957). Thus, when one of Appellant's Navajo employees performs a service for one of Appellant's guests, he or she is acting as a representative of Appellant, not the Nation. To highlight my point, I note that if one of these same employees injures a guest while acting within the scope of his or her employment, it is Appellant, not the Nation, who is responsible for the injuries. *See id.* § 219(1); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.").

I fail to see the relevance of the fourth factor relied upon by the Navajo Supreme Court, i.e., that suppliers cross the reservation to bring supplies to Appellant and its guests. The evidence in the record indicates that, while guests[21] and suppliers actually travel inside the boundaries of the reservation to arrive at Appellant's property, they do so via U.S. Highway 89 and Arizona Highway 64, both of which are maintained by the State of Arizona. In other words, Appellant's suppliers and non-Indian guests travel on rights-of-way allocated to the federal government and the State of Arizona, and maintained by the State of Arizona, to arrive at Appellant's fee patent land within the exterior boundaries of the Navajo Nation. Nothing from this conduct alone gives rise to a knowing and consensual relationship between Appellant's guests and the Navajo Nation sufficient to afford the Nation the right to regulate Appellant's guests. *See*

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[21] The record indicates that the majority of Appellant's non-Indian guests are tourists traveling to and from the Grand Canyon on tour buses. App., Vol. I at 127-29, 178-79, 395.

Strate, 520 U.S. at 456-57 (concluding there was no consensual relationship between tribe and parties involved in accident on highway that ran through reservation).

As for the Navajo Supreme Court's conclusion that Appellant's non-Indian guests "receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government," I find little support for this conclusion in the record. Although the Nation provides law enforcement services to Appellant and its guests, the evidence indicates this is largely the result of agreements and understandings among the State of Arizona, the counties surrounding the reservation, and the Nation. Thus, when Appellant or its guests place a 911 call, it is first routed to state or county authorities outside the reservation who decide how to handle it. If and when the Nation's law enforcement officers perform a task involving a non-Indian, they generally do so as officers of the State of Arizona, rather than the Nation. As for fire prevention services, the record indicates that the Nation's fire department is available to assist in extinguishing any fires on Appellant's property. However, the evidence indicates that the Nation's fire department has, at most, reported to only one fire call from Appellant's property, and there is no evidence that the fire involved or threatened Appellant's guests.[22] Finally, there is no evidence

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[22] The evidence regarding this single incident is sketchy. In particular, the evidence suggests that Appellant contacted the Arizona state police, and it is unclear whether it was the Nation's fire department or the Bureau of Indian Affairs' fire department that responded. App., Vol. I at 205-06. In any event, the evidence indicates Appellant has its own firefighting equipment and its maintenance personnel is trained to use the equipment. *Id.* at 136, 180. During a subsequent fire involving an employee housing unit, Appellant's employees extinguished the fire. *Id.* at 253. The Nation's fire department did not respond at all to that fire. *Id.* at 180. Although one

that any of Appellant's non-Indian guests have been provided medical,[23] health protection[24], or tourism services by the Nation.

In the end, the evidence contained in the record is insufficient, in my view, to support the conclusion that a consensual relationship, either express or implied, exists between the Nation and Appellant's non-Indian guests. I conclude the Nation cannot rely on the first *Montana* exception as authority to regulate Appellant's non-Indian guests.

Effect on the Nation's political integrity, economic security, or health and welfare

Again, although the Nation has not asserted any threat or direct effect from Appellant's non-Indian guests on its political integrity, economic security, or health and welfare, the Navajo Supreme Court concluded that such a threat or direct effect existed and justified the exercise of tribal authority under the second *Montana* exception. Specifically, the Navajo Supreme Court concluded as follows:

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of the Nation's police officers apparently responded, the fire had been extinguished by the time he arrived. *Id.* at 253.

[23] Non-Indian guests seeking medical treatment are referred by Appellant to a medical facility in Flagstaff, Arizona, approximately 54 miles away from the Property. App., Vol. I at 126, 135, 180-81.

[24] The NTC found that "[a] variety of health services are offered to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the Navajo Nation." App., Vol. I at 400. To the extent this finding implicates Appellant's non-Indian guests, it is erroneous since there is no evidence in the record indicating that these health inspection services involved Appellant's operations, or otherwise benefited Appellant's non-Indian guests.

Taxation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity. A sovereign nation that cannot raise revenues to conduct governmental operations cannot function. Aside from the need to raise revenue to fund essential governmental services, (citation omitted), taxation is a method of business regulation. A hotel occupancy tax is utilized to determine and project the number of tourist visits each year. Funds are then channeled to those governmental programs which benefit tourists, including police and fire protection, medical treatment, health inspections, tourism information, tourist facilities, and others.

The economic security element is similar. The Navajo Nation is seeking self-reliance and economic security through taxation. The present national trend is to shift the financial obligations of governance and government services from the federal government to the states. Public services which were formerly provided by the federal government are now the states' responsibility. The states can readily assume those obligations because of their strong tax bases. Unlike the states, the Navajo Nation just recently began building its tax base, and the hotel occupancy tax contributes to that foundation.

The Navajo Nation's health and welfare interests are also implicated. The Navajo Nation assumed the responsibility of the Indian Health Service to assure public health in the form of housing code regulation, health inspections, and providing public health services to [Appellant's] guests. The "welfare" interest is used here in the sense of protecting the

> public welfare, as has been previously elaborated in this opinion.
>
> The second *Montana* exception also implicates Indian nation police power. . . . Cameron, Navajo nation (Arizona) is not a "hole" within Navajo Nation territorial jurisdiction. The Navajo Nation has responsibilities to everyone who is present within its jurisdiction.

App. at 702-04.

As is apparent from the above-quoted language, the Navajo Supreme Court's analysis is nonsensical. Nowhere does the court cite to any evidence demonstrating that the conduct, or even the mere presence, of Appellant's non-Indian guests represents a threat to, or has a direct effect on, the Nation's political integrity, economic security, or health and welfare. Instead, the court seems to suggest that the Nation's desire for self-reliance, and its need for governmental funding, justifies the imposition of the HOT on Appellant's non-member guests. This circular reasoning, which could arguably be used to justify any tax on non-Indians on fee patent land, does not satisfy the second *Montana* exception.

Neither the conduct nor presence of Appellant's non-Indian guests threatens or affects the Nation's ability to govern itself and its people. Nor has there been any showing that Appellant's guests in any way threaten or affect the health and welfare of the Nation and its people. Perhaps the best argument that can be made is that the Nation's limited provision of services to Appellant and its guests (e.g., police and fire protection) has a direct effect on the Nation's economic security. More specifically, it is undoubtedly true that the provision of such services costs money and impacts the Nation's budget. However, the evidence presented on this

point was extremely limited, and it is impossible to conclude that the provision of such services threatens or directly affects the Nation's economic security in such a fashion as to qualify for *Montana*'s second exception. *See Strate*, 520 U.S. at 459 (suggesting that the second *Montana* exception is limited to situations where tribal regulatory or adjudicatory authority is needed to preserve the right of reservation Indians to make their own laws and be ruled by them); *Brendale*, 492 U.S. at 431 (White, J.) (under the second *Montana* exception, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe").

Conclusion

For the reasons outlined above, I conclude the Nation does not have civil authority over Appellant's non-Indian guests. In particular, there is no treaty or federal statute granting the Nation such authority, and the evidence contained in the record is insufficient to demonstrate the applicability of either of the two *Montana* exceptions. I would reverse and remand this case with directions to enter judgment in favor of Appellant.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2247

ATKINSON TRADING COMPANY, INC.,
A NEW MEXICO CORPORATION,
Plaintiff - Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN; ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION; STEVEN C. BEGAY, DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants-Appellees.

ORDER
Filed June 26, 2000

Before SEYMOUR, Chief Judge, McKay, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO and MURPHY, Circuit Judges.

Atkinson Trading's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. Judge Briscoe voted to grant rehearing and called for a poll of the en banc court. Judges Tacha, Baldock, Brorby and Murphy voted to grant rehearing en banc. As the active judges split five to five in response to the poll, the suggestion for en banc rehearing fails.

Entered for the Court
PATRICK FISHER, Clerk of Court
by:

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1261 BB/LFG

ATKINSON TRADING CO., INC.
A New Mexico corporation,
Plaintiff,

VS.

NELSON GORMAN, HOMER BLUEHOUSE, KING MIKE, JR., LEANDER BERGEN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants.

MEMORANDUM OPINION

THIS MATTER comes before the Court for consideration of Plaintiff's March 30, 1998 motions for summary judgment and trial *de novo* (Docs. 19 and 21), as well as Defendants' March 30, 1988 motion for summary judgment (Doc. 23). The Court has reviewed the parties' submissions and the relevant law and, for the reasons set forth below, will DENY Plaintiff's motions and GRANT Defendant's motion. Oral argument is not necessary.

Procedural History

This case involves a challenge to a Hotel Occupancy Tax ("HOT") enacted by the Navajo Tribe and applied to Plaintiff's customers. Plaintiff initially challenged the tax in federal court, but the action was dismissed without prejudice because Plaintiff had not exhausted its tribal remedies.

Atkinson Trading Co. v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994). Plaintiff then completed the exhaustion process by participating in administrative proceedings, including a trial-type hearing before a hearing officer of the Navajo Tax Commission ("NTC"), and by unsuccessfully appealing the NTC's adverse decision to the Navajo Supreme Court. Following that unsuccessful appeal, Plaintiff filed the instant action for declaratory judgment, requesting a ruling that the Tribe has no jurisdiction to impose the HOT on Plaintiff's overnight guests. As part of this action, the parties have submitted the entire record developed below, including transcripts and exhibits from the NTC proceedings and the appellate record created in the Supreme Court. Based on that record, Plaintiff and the Tribe have filed cross-motions for summary judgment on the jurisdictional issue. Plaintiff has also filed a motion for a trial *de novo,* which the Court will address initially.

Motion for Trial *De Novo*

As Plaintiff acknowledges, the Tenth Circuit has recently decided that in cases such as this, concerning a tribal-court decision asserting jurisdiction over non-members, the proper standard of review is for this Court to review the tribal court's findings of fact for clear error, while applying a *de novo* review to the tribal court's conclusions of law. *Mustang Production Co. v. Harrison* 94 F.3d 1382, 1384 (10th Cir. 1996). Plaintiff's motion for trial *de novo* is an attempt to avoid application of *Mustang*'s deferential standard concerning factual matters. Instead, Plaintiff would have this Court engage in a new fact-finding effort, even though Plaintiff had an opportunity to fully develop all the relevant facts in the administrative proceedings held by the NTC.

Plaintiff makes two main arguments in support of its position. First, according to Plaintiff, this Court should not give deference to the Navajo Supreme Court's findings of fact because several of them were not supported by the

evidence presented at the administrative trial, and because the Supreme Court exhibited bias in its opinion. The Court notes, however, that in addressing this matter the Navajo Supreme Court was acting as a court of review, not a fact-finding court, and therefore any statements of fact made in its opinion are not "findings" that are to be given deference; rather, it is the fact-finder's determinations, the findings made by the NTC, that are entitled to such deference. Any "findings" the Supreme Court may have made that are not supported by the evidence are simply erroneous statements of the evidence presented below, and may be treated as such—that is, ignored or refuted—by this Court.

The Court also notes the "findings" about which Plaintiff complains are irrelevant to the issue presented to this Court. Plaintiff argues that the Supreme Court's opinion makes some statements about the nature of Plaintiff's business that were not supported by the evidence. In particular, Plaintiff complains about the Supreme Court's observation that Plaintiff uses Native American trappings to lure tourists to its establishment. Whether the Court's statements are true or not, they bear little or no weight on the question to be decided in this case, which is whether the HOT can be imposed on Plaintiff's non-Indian customers. Similarly, Plaintiff complains about the Supreme Court's negative statements concerning the General Allotment Act, arguing that those statements are not based on any evidence presented during the trial and that they exhibit the Court's bias. Again, these statements are irrelevant to the issues in this case, and are no more than restatements of a view held by many Indian and non-Indian scholars—that the allotment policy turned out, in retrospect, to be a dismal failure. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* 614 (1982 ed.).

In addition, Plaintiff does not contest any of the essential facts found by the NTC and relied on by the Supreme Court. These include the Tribe's provision of police, fire protection,

and other services to Plaintiff's customers, as well as the physical location of Plaintiff's business. There is no need for a *de novo* trial that would afford Plaintiff a second opportunity to contradict facts that it did not contest in the first proceeding.

Plaintiff's second argument against application of the *Mustang* standard of review is a contention that *Mustang* was wrongly decided. Plaintiff recognizes this Court has no power to overrule *Mustang*, but wishes to preserve the issue for possible appellate review. Plaintiff has correctly recognized the limits of this Court's power, and the Court need not address this argument further.

In sum, this Court's reading of the Navajo Supreme Court's opinion is that, even accepting Plaintiff's contention that the opinion makes some erroneous statements of fact that are not supported by the evidence, the opinion does not come close to exhibiting the type of bias that would justify applying a different standard of review to the tribal court's decision than the standard adopted in *Mustang*. The Court will therefore apply the *Mustang* standard in this case.

Motions for Summary Judgment

Facts: The Court has reviewed the transcript of the NTC proceedings, depositions introduced into evidence during those proceedings, the exhibits submitted to the NTC, and the NTC's findings of fact. The facts supported by the foregoing may be summarized as follows. Plaintiff is a non-Indian New Mexico corporation that operates a business, known as the Cameron Trading Post, on fee land located within the boundaries of the Navajo Nation. The establishment is in Cameron, Arizona, a small community northeast of Flagstaff. Plaintiff's property is completely surrounded by reservation trust lands. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and RV park. These businesses focus on the tourist market and deal almost

exclusively with nonmembers of the Navajo Nation. A significant portion of the Trading Post's business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon.

Plaintiff's customers travel on reservation land to reach the Trading Post, either on a federal highway or a state highway. These highways pass over rights-of-way granted by the Tribe. The highways are jointly patrolled by the Arizona state, and Navajo tribal, police, but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. A substation of the Tribe's Tuba City police department is located in Cameron. When a 911 call is placed from the Post, the call is referred to the tribal police for first response. In addition, the Post has an alarm system that triggers calls to the tribal police. That is, when the alarm goes off, the operator of the alarm system calls the tribal police, rather than a non-tribal law enforcement office, to request a response.[25] The Trading Post has a non-loitering policy, and tribal police enforce that policy by requiring juveniles and others that are "hanging out" to move off the Post's property. Tribal police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires.

Fire protection in the area of the Trading Post is provided jointly by the tribal fire department in Tuba City, located about 25 miles from Cameron; the Bureau of Indian Affairs (" BIA") fire department (also located in Tuba City); a fire department called the Timberline department that is located

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[25] As with many private alarm systems, there have been numerous false alarms triggered by the Post's system, including a number of false alarms caused by a cat wandering around the Post's attic. The tribal police department's responses to the private alarms became much less prompt after a number of these false alarms.

45 miles from Cameron; and the Grand Canyon fire department, located over 50 miles from Cameron. The tribal and BIA departments cooperate closely with each other, and provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post, to which the tribal fire department as well as the Timberline department responded.

Emergency medical services in the Cameron area are provided by a tribal entity called the Emergency Medical Services Department ("EMS"). EMS maintains two ambulances in Tuba City. EMS responds to all calls from locations within the Navajo Nation, and has responded to numerous calls concerning automobile accidents in the Cameron area. The tribal police and fire departments have also received and responded to many auto accident calls in the area, involving both Navajos and non-Navajos. If the state police called Flagstaff emergency services instead of the tribal EMS, however, the Flagstaff unit would respond to the call.

The Navajo Nation has a tourism department that provides information to prospective visitors over the telephone or through brochures. That department is also attempting to stimulate tourism by developing "vendor villages" in several locations on the reservation that receive heavy tourist use, including the Cameron area.

The Court notes that the Tribe has not questioned Plaintiff's standing to challenge the HOT, either in the tribal proceedings or in this Court. It is not entirely clear that Plaintiff does have such standing, since the tax is not imposed on Plaintiff but on its customers.[26] However, by failing to

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[26] By the express terms of the regulations implementing the HOT, which were approved by the Navajo Tribal Council when the HOT was enacted, the incidence of the tax falls on a hotel's customers, rather than

raise the issue the Tribe deprived Plaintiff of the opportunity to make a factual record that might have established its standing.[27] The issue of standing, therefore, is not addressed in this opinion.

Proper Analysis to be Applied: As noted above, this case involves a tribe's attempt to impose a tax on nonmembers who are staying overnight on fee land located within the reservation boundaries. Plaintiff argues strenuously that, due to the fee-land status of its hotel and the nonmember status of most of its guests, the only jurisdictional factors properly

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the hotel itself. In fact, hotels collecting the tax on behalf of the Tribe, such as Plaintiff, are reimbursed for their administrative costs. Therefore, the incidence of the tax falls on Plaintiff's overnight guests, and it is the relationship between those guests and the Tribe that must be considered in deciding whether the HOT can be upheld. *Cf. Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459-60 (1995) (stating, albeit in the context of a state tax imposed on a tribe, that the "legal incidence" test is an initial and frequently dispositive question in Indian tax cases).

[27] There appears to be no precedent directly on point concerning application of the legal incidence test to a situation involving a tribal tax, rather than a state tax. However, as the Court discusses below, the standard that should be applied to decide the jurisdictional issue in this case is the one set out in *Montana v. United States*, 450 U.S. 544 (1981), and reiterated in *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997). *Cf. Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1298-99 (8th Cir. 1994) (reversing summary judgment granted without addressing *Montana* factors raised by the tribe). This standard requires an analysis of whether the nonmembers sought to be taxed have entered consensual relationships with the tribe or its members, or whether those nonmembers' conduct threatens the tribe's political integrity, economic security, or health and welfare. By its very focus on the actions of the nonmembers over whom the tribe seeks jurisdiction, the *Montana* test seems to require application of the legal-incidence test. In this case, in particular, it is important to analyze the extent to which the hotel guests have entered a consensual relationship with the tribe, or have otherwise had enough of an impact on the tribe to allow the tribe to tax them.

considered in this case are those set out in *Montana*, 450 U.S. at 544-45, and reiterated in *Strate*, 117 S.Ct. at 1409. The Court will refer to these factors as the consensual-relationships test. The Tribe, on the other hand, maintains just as strenuously that the consensual-relationships test is not properly applied to this case, for several reasons. The Court will briefly discuss the Tribe's central arguments.

Issue/Claim Preclusion: The Tribe argues that Plaintiff is bound by either claim preclusion (res judicata) or issue preclusion (collateral estoppel) from re-litigating the jurisdictional issue raised in this case. This argument is based on a prior case decided by the Ninth Circuit, in which Plaintiff was held to be subject to the federal Indian Trader statutes and regulations. *Ashcroft v. United States*, 679 F.2d 196 (1982). In so holding, the *Ashcroft* opinion made several statements indicating Plaintiff is subject to tribal jurisdiction. According to the Tribe, these statements are dispositive of the issue raised in this case. However, the parties in the *Ashcroft* case were different, because the Tribe was not involved in *Ashcroft* and the United States was not acting in privity with the Tribe. Accordingly, the claim-preclusion doctrine is not applicable to this case. *See Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir. 1990) (res judicata applies where there is an identity of parties). Also, the taxation issue in this case is not the same as the issue presented and necessarily decided in *Ashcroft*. That is, even if Plaintiff is an Indian Trader as far as its transactions with Navajos are concerned, that does not answer the question as to whether the Tribe has jurisdiction to tax Plaintiff's nonmember hotel guests. For this reason, issue preclusion is not appropriate in this case. *See id.* (collateral estoppel applies where the issues raised in the successive proceedings are the same, and determination of those issues was essential to the prior decision). Neither claim preclusion nor issue preclusion, therefore, prevents this Court from reaching the merits of the parties' arguments.

Merrion Test vs. Montana Test: The Tribe also argues that the *Montana* test does not apply to taxation cases. Instead, argues the Tribe, tax jurisdiction, unlike regulatory or adjudicative jurisdiction, is strictly territorial in nature. According to the Tribe, as long as the activity takes place within the Tribe's territorial jurisdiction, and the Tribe provides some services to the taxpayer, the Tribe may tax the activity. This argument is based on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which discussed the tribe's provision of services and the "advantages of a civilized society" as a basis for tribal taxation of nonmember activity taking place on a reservation. Plaintiff responds to this argument by pointing out that *Merrion* involved activity occurring on tribal land, not fee land, and by arguing that the *Merrion* provision-of-services discussion has no applicability to fee-land cases. Instead, Plaintiff insists, the *Montana* consensual-relationships test is the only analysis properly applied to determine the limits of all tribal civil jurisdiction over fee land located inside a reservation, including the power to tax.

The Tribe's argument that *Merrion* is the proper test to apply is based on a Tenth Circuit case which, according to the Tribe, supports its claim that taxation jurisdiction is different than other civil jurisdiction, and is more strictly territorial. In *Pittsburg Midway Coal Mining Co. v Watchman*, 52 F.3d 1531, 1540-41 (10th Cir. 1995), a tribal-tax case, the Tenth Circuit held that the plaintiff would be required to exhaust its tribal remedies if its coal mine were determined to be located in Indian Country. In so holding, the Tenth Circuit made some statements about tribal jurisdiction to tax, connecting that jurisdiction with the definition of Indian Country found in 18 U.S.C. § 1151—reservations, allotments, and dependent Indian communities. The Court also concluded that "the Navajo Nation has authority to tax any mining activities

taking place in Indian country without violating any express jurisdictional prohibitions." 52 F.3d at 1541.

Read broadly, the above language could be interpreted to mean the Tenth Circuit has established different guidelines for taxing jurisdiction than for regulatory or tribal court civil jurisdiction. The *Montana* test would apply to regulatory matters and, pursuant to *Strate*, to cases involving civil litigation in tribal court. The 18 U.S.C. § 1151 definition of Indian Country, in conjunction, with the *Merrion* provision-of-services test, would apply to tax jurisdiction questions. The Court does not believe the Tenth Circuit intended such a broad reading of its holding. Instead, the language of *Pittsburg & Midway* must be read in light of the question that was answered in that case. The only issue before the Tenth Circuit was whether the tribe's attempt to impose a tax on the plaintiff's mine was "patently violative of express jurisdictional prohibitions," so as to excuse the plaintiff from exhausting its tribal remedies. 52 F.3d at 1539-40. For purposes of that question only, the *Pittsburgh & Midway* opinion holds that no express jurisdictional prohibition will be violated if the activity sought to be taxed takes place within Indian Country, as defined by 18 U.S.C. § 1151. That is, § 1151 creates, subject to other considerations such as the *Montana* and *Merrion* factors, a rebuttable presumption of jurisdiction to tax non-Indian activity taking place within a reservation, allotment, or dependent Indian community. *Cf. Texaco. Inc. v. Hale*, 81 F.3d 934, 938 (10th Cir. 1996) (In addition to the fact the tribally taxed activities occurred within Indian Country, both the district and appellate courts considered contractual and consensual relationships in deciding exhaustion of tribal remedies should be required). This does not mean, however, that all such activities taking place in locations that fall within Indian Country are automatically taxable by the tribe. It means only that nonmembers engaging in activity that is arguably located in

Indian Country, who wish to challenge a tribal tax, will be required to exhaust their tribal remedies before proceeding to federal court. The Court therefore does not accept the Tribe's argument that the *Pittsburg & Midway* opinion precludes application of the *Montana* test to the HOT involved in this case.

Consensual-relationships Test as Applied to this Case: It is clear to the Court that the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation case. In both *Montana* and *Strate*, the Supreme Court mentioned the tribes' right to tax certain activities as a matter of inherent sovereign power. However, both opinions limit this power by imposing conditions on it, specifically stating that a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, or that seriously affect the political integrity, economic security, or health and welfare of the tribe. *Montana*, 450 U.S. at 565-66; *Strate*, quoting *Montana*, 117 S.Ct. at 1409. The Supreme Court's inclusion of the taxation power within its discussion of the consensual-relationships test indicates that the test applies to that form of tribal jurisdiction as well as to tribal regulatory and judicial authority over non-members.

On the other hand, *Merrion* cannot simply be ignored, as Plaintiff would have it, because the activity in this case takes place on fee land. Where a tribe provides essential services within Indian Country, even to nonmembers and even on fee land, and thus affords the "benefits of a civilized society" to those nonmembers, fairness indicates that it be allowed to impose taxes to help pay for those services. This is merely the flip side of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), which upheld the application of state taxes to oil and gas extracted from a reservation by non-Indian companies. In doing so, the *Cotton* opinion emphasized the

fact that the state provided services to the companies and the tribe, and distinguished prior cases in which the state had in effect washed its hands of the activity and had nothing to do with the activity, save tax it. 490 U.S. at 186. Of course, the tribe's interest in taxing an activity is strongest where the revenues derived from the activity are derived from value generated on a reservation, by tribal activity, and where the taxpayer receives tribal services. *Merrion*, 455 U.S. at 138. This does not mean, however, that the tribe has no such interest where the value is not generated by tribal activity and occurs on fee land, if services are provided anyway and the fee land is located in Indian Country. The *Merrion* provision-of-services or benefits-of-a-civilized-society factors, thus, are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present to allow the tribe to impose a tax upon the fee-land activity.

The real question with respect to tribal-taxation cases and the consensual relationships test is whether the nonmembers' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity. *Cf., e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 430-31 (1989) (tribe's interest in zoning fee lands within reservation becomes stronger as the impact on the tribe from activity on the fee lands becomes more serious). The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction. *Id.*; *cf. Cotton Petroleum*, 490 U.S. at 186, n. 17 (discussing fact that certain state taxes were extraordinarily high and had a negative effect on the marketability of the tribe's coal as basis for disallowing taxes); *see generally Washington v. Confederated Tribes of*

the Colville Reservation, 447 U.S. 134, 156 (1980) (principle of tribal self-government is grounded in notions of inherent sovereignty and congressional policies, and seeks an accommodation between the interests of the tribes, the federal government, and the state); Cohen, *Handbook of Federal Indian Law* 256-57 (describing *Montana* and *Colville* as applying a test based on the significance of tribal interests involved, to determine whether tribe would be allowed to exercise regulatory control or taxing authority over nonmembers).

To properly perform the necessary balancing test required for determining whether the HOT was validly imposed on Plaintiff's hotel guests in this case, it is necessary to examine the nature of the relationship between those guests and the Tribe, and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the HOT. No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members. However, where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity. *Cf.* NMSA 1978, § 66-8-107 (by driving in New Mexico, motorists give implied consent to have their breath tested for alcohol if they are stopped for driving under the influence). The Court finds that one necessary predicate for taxation, a consensual relationship, was present in this case.[28]

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[28] The Court does not mean to imply that a consensual relationship is always a necessary prerequisite for taxation. Consideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax. It is not necessary to consider that possibility in this case.

The next step requires an analysis of the nature of the hotel guests' activity on the reservation and the extent to which the Tribe provides services that are relevant to that activity. The guests' activity, of course, consists of their trip to the reservation and their overnight stay. By engaging in that activity, the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel. Motor vehicle accidents involving tourists have occurred in the past and will almost certainly occur again. Tribal EMS personnel, police officers, and fire department personnel all respond to calls involving such accidents. In addition, tribal police officers provide directions to tourists, change flat tires, and provide other miscellaneous assistance. Furthermore, tribal police officers are the primary providers of law enforcement in the Cameron area, and regularly patrol the Trading Post, removing loiterers and intoxicated individuals. The mere presence of tribal police officers on the highways, enforcing traffic regulations and other laws, contributes to the safety of tourists by deterring unsafe or illegal behavior. Finally, the tribal tourism department provides information services to prospective or current visitors to the area, and is working on projects designed to enhance the experience of tourists visiting the reservation. In sum, the Tribe provides Plaintiff's overnight guests with the "benefits of civilized society" while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services. The fact that some of these services are also provided, to a lesser extent, by the state of Arizona, does not lessen the Tribe's interest in the hotel guests' on-reservation activity.[29]

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[29] The main difficulty with the application of the "benefits of a civilized society" test is that while government services in Indian Country are often sparse, both the tribe and state (including local and country entities) are allowed to impose taxes to pay for such services. This "dual

As to the burdens imposed by the Tribe on the nonmember guests, they are minimal. Unlike zoning restrictions or hunting and fishing regulations, which directly restrict nonmembers' ability to act or use their property in certain ways, the HOT involves only the payment of a tax of 8% of the room rate. There was evidence that this rate is lower than the occupancy-tax rate imposed by many municipalities, and Plaintiff made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe.

As the foregoing analysis shows, application of the balancing test required in cases such as this establishes that the Tribe has the authority to impose the HOT on Plaintiff's hotel guests. The services as well as the civilized society provided by the Tribe are directly related to activity engaged in on the reservation, and the burden created by the HOT is small. Under *Cotton Petroleum* and *Merrion*, a state has joint taxing authority with a tribe over non-Indian activity taking place on tribal lands, as long as the state provides some level of services. Similarly, where a tribe provides essential services to non-members who voluntarily visit the reservation, even if the visit is primarily to fee land, the tribe should at minimum have joint taxing authority over the activities to which the tribe's services are relevant. This is not a case in which the Tribe has nothing to do with the fee-land activity, save tax it. *See Cotton Petroleum*. Accordingly,

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taxation" puts business enterprises within Indian Country at a competitive disadvantage. See Robert W. Alexander, *The Collision of Tribal Natural Resource Development and State Taxation An Economic Analysis*, 27 N.M.L.Rev. 387 (1997). Unfortunately, however, the most obvious and equitable solution to this dilemma, a revenue sharing agreement, is beyond this Court's power.

the Court holds that the Tribe has jurisdiction to impose the HOT on Plaintiff's guests.[30]

Conclusion

Based on the foregoing, the Tribe's motion for summary judgment will be granted, and Plaintiffs motions for summary judgment and for a trial *de novo* will be denied.

An Order in accordance with this Memorandum Opinion will issue.

Dated August 14, 1998.

/s/ BRUCE D. BLACK
United States District Judge

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[30] The Court notes that Plaintiff several times mentioned the fact that neither Plaintiff nor its overnight guests are entitled to vote in Navajo elections, and pointed out that the HOT was plainly designed to apply mainly to non-members, who are the ones most likely to be staying at hotels. Plaintiff did not develop the argument into a taxation-without-representation theme or provide legal authority. In any event, these facts have no impact on the validity of the HOT. All occupancy taxes are designed to shift some of the burden of financing government services from residents to nonresidents, and all such taxes apply mainly to nonresidents of the locality, who cannot vote in the elections that ultimately result in the enactment of occupancy taxes. *See Miami Dolphins Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. App. 1981) (room tax not discriminatory as to nonresidents); *see also People v. Evans*, 57 Cal. Rptr. 276 (Cal. App. 1967) (tax on transients based on privilege of temporary occupancy and did not violate constitution). The Court has found no case invalidating a hotel occupancy tax on the basis that the parties paying the tax were not entitled to vote in the locality imposing the tax.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1261 BB/LFG

ATKINSON TRADING CO., INC. A NEW MEXICO CORPORATION,
Plaintiff,

VS.

NELSON GORMAN, HOMER BLUEHOUSE, KING MIKE, JR., LEANDER BERGEN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants.

ORDER

A Memorandum Opinion in the above-entitled case was entered this date.

IT IS THEREFORE ORDERED that Defendants' March 30, 1998 motion for summary judgment (Doc. 23) be, and hereby is, GRANTED, and Plaintiff's March 30, 1998 motions for summary judgment and for trial *de novo* (Docs. 19, 21) be, and hereby are, DENIED. This case is therefore dismissed.

DATED August 21, 1998.

/s/ BRUCE D. BLACK
United States District Judge

APPENDIX D

SUPREME COURT OF THE NAVAJO NATION

No. SC-CV-54-95

In the Matter of: ATKINSON Trading Company, Inc.,
Appellant.

OPINION

Before YAZZIE, Chief Justice, AUSTIN and CADMAN, Associate Justices.

Appeal from a decision of the Navajo Tax Commission, No. 95-008.

James B. Collins, Esq., Farmington, New Mexico, William J. Darling, Esq., Albuquerque, New Mexico, and Katherine M. Peck, Esq., Albuquerque, New Mexico, for the Appellant; Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., Navajo Nation Department of Justice, Window Rock, Navajo Nation (Arizona), for the Appellee Navajo Tax Commission. Opinion delivered by AUSTIN, Associate Justice.

In 1994, Atkinson Trading Company, Inc. (Atkinson) sought a federal district court declaratory judgment claiming that the Navajo Nation cannot impose a hotel occupancy tax on its non-Indian guests and require it to collect and remit that tax to the Navajo Nation. *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994). The court declined to consider that issue and properly sent the question to the Navajo Nation forum to "evaluate tribal law in light of existing federal law," trusting that "[t]here is every reason to expect that the Navajo Nation will grant plaintiff a fair, unbiased consideration of its arguments about why the Hotel Occupancy Tax should not be imposed on plaintiff's operations." *Id.* at 512.

The Navajo Tax Commission (Commission) considered Atkinson's claims and, after applying the tests in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), and *Montana v. United States*, 450 U.S. 544, 565-66 (1981), ruled that Atkinson was subject to provisions of the Navajo Nation Hotel Occupancy Tax, to help defray the costs of Navajo Nation governmental services which benefit Atkinson and its guests. Atkinson appeals. The sole issue we address is whether Atkinson is subject to provisions of the Navajo Nation Hotel Occupancy Tax for the rental of rooms at a facility located on non-Indian fee land within the exterior boundaries of the Navajo Nation. In other words, does existing federal law preclude the Navajo Nation from applying its hotel tax to non-Navajo tourists lodging on non-Indian fee land and requiring Atkinson to collect and remit that tax?

I.

On July 30, 1992, the Navajo Nation Council enacted the Navajo Nation Hotel Occupancy Tax, 24 N.N.C. §§ 101-142 (1995), which became effective on January 1, 1993. It is imposed on all guests who rent hotel rooms within the exterior boundaries of the Navajo Nation. The hotel proprietor must collect, remit and report the tax to the Navajo Nation. 24 N.N.C. §§ 102, 104. The proprietor can keep "one percent of the amount of the tax due as shown on the return" as reimbursement for its tax collection costs. 24 N.N.C. § 109. The tax is used to promote tourism and develop tourism-related projects in the Navajo Nation. 24 N.N.C. § 142. The Commission administers the tax. 24 N.N.C. § 108.

Atkinson, a New Mexico Corporation with a principal place of business at Gallup, New Mexico, operates a facility known as the Cameron Trading Post at Cameron, Navajo Nation (Arizona), within the exterior boundaries of the Navajo Nation. The facility is located on non-Indian fee land

and completely surrounded by Navajo Nation trust lands. See Act to Define the Exterior Boundaries of the Navajo Indian Reservation in Arizona and for Other Purposes, 48 Stat. 960-62 (June 14, 1934) (1934 Boundary Act). The facility caters to the tourist trade, with a hotel, restaurant, cafeteria, gallery, curio shop, retail store and recreational vehicle park. It is near the east entrance to the Grand Canyon.[31] The guests who stay at the hotel and use the facilities are primarily non-Navajo tourists. They are required to pay a tax for their room, which Atkinson must collect and remit to the Navajo Nation.[32]

The Commission found that guests are served by Navajo employees of the facility, who are 75 to 80% of Atkinson's work force. Guests get goods brought by suppliers who enter and travel across the Navajo Nation to reach Atkinson's facility. That includes Navajo arts and crafts which Atkinson buys from off-reservation sources. Atkinson stopped buying arts and crafts from Navajo artisans in 1995, apparently to avoid direct contact with Navajos and to avoid Navajo Nation regulation. A small amount of sales are made to Navajo Nation members.

The Navajo Nation Police, the primary law enforcement agency in the Cameron area, and the Navajo Nation Fire

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[31] We take judicial notice that the Cameron Trading Post sits near the junction of U.S. Highway 89 and Arizona Route 64, which goes to the Little Colorado River (Navajo Nation) Tribal Park and enters Grand Canyon National Park. See, Map 44, Parks and Sacred Places, James M. Goodman, *The Navajo Atlas* 88 (1982). The record does not disclose the history of Cameron Trading Post in the area. We also take judicial notice that it is significant that the business, operating under the names "trading company" and "trading post" and headquartered in Gallup, New Mexico, is based on a longstanding history of using Indian trading posts and Navajo Indians as a lure for tourists.

[32] The record does not show a tourist challenge to the tax.

Department, protect the tourists and Atkinson's facility. Both respond to emergency calls, including 911 calls, from tourists and local residents. The police routinely patrol and perform security checks in the area, including Atkinson's facility, which benefit tourist safety and security. The police respond to accidents involving non-Indian tourists and call Navajo Nation emergency medical services for them when needed. The Navajo Nation Division of Health protects the health of guests by inspecting food preparation conditions, not only in the Cameron area, but throughout the Navajo Nation. The Navajo Nation Tourism Department serves guests by telling them of the attractions of the Navajo Nation and provides facilities, and that function also serves Atkinson. As a general matter, the Navajo Nation government funds many kinds of activities which benefit Atkinson and its guests, including economic development ventures, human resource programs, natural resource development (including parks and scenic sites), public safety, health services, social services, education, and legislative and judicial services.

In sum, Atkinson and Cameron, as an (Indian) trading "company" or "post," operate in a Navajo environment and use Navajo trappings to lure tourists. Those tourists and the facility benefit from a wide range of Navajo Nation governmental services.

II.

At the outset, Atkinson concedes that anyone lodging on trust lands and Navajo Nation members lodging on non-Indian fee lands can be charged a Navajo Nation hotel tax. Appellant's Brief at 6. But as to non-members renting rooms on non-Indian fee lands, Atkinson claims that the Navajo Nation has no power to impose its hotel tax or require non-member businesses to collect and remit that tax. Apparently, Atkinson is willing to collect and remit the tax if it is imposed on Navajo Nation members only at its facility.

Atkinson has resisted regulation as an entity doing business in Indian Country before. In *Ashcroft v. United States*, 679 F.2d 196 (9th Cir. 1982), Atkinson (then an Arizona corporation and doing business as Gilbert Ortega's Cameron Trading Post) opposed federal regulation as an Indian trader under the Indian Trader Statutes, 25 U.S.C. §§ 261-264. There, as here,[33] Atkinson claimed that its lands "either existed before the creation of the [Navajo] Reservation or were withdrawn from the reservation after its creation." *Ashcroft*, 679 F.2d at 198, n.1. Therefore, Atkinson claimed the United States had no authority to regulate its trade on fee land within the exterior boundaries of an Indian reservation because it was "not on the reservation."[34] *Id.* at 198 (emphasis added). The court disagreed, finding that federal business regulations defining on-reservation activities, and the doctrine of inherent tribal sovereign power proclaimed in several United States Supreme Court decisions,[35] compelled a ruling that business activities conducted on fee land within the exterior boundaries of a reservation were in fact "on" reservation

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[33] Atkinson says its fee land resembles a donut: "Clearly, the hole in the center of a donut is not a part of the donut and here Congress carved out a hole in tribal jurisdiction when it extended the boundaries of the Navajo Reservation to surround Cameron Trading Post." Appellant's Brief at 14.

[34] The Commission rejected the contention that rulings in the *Ashcroft* decision bound its decision under preclusion doctrines of res adjudicata or collateral estoppel because the issues in the federal case were different. On appeal, the Commission invites us to apply those preclusion doctrines. Without deciding that question, we prefer to address the merits raised by Atkinson.

[35] *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla v. Apache Tribe*, 455 U.S. 130 (1982); *Kennerly v. District Court*, 400 U.S. 423 (1971); and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

conduct which could be regulated by either the United States or an Indian nation. *Id.* at 199-200. The court explained that "Indian tribes retain inherent sovereign power to act in accordance with the authority recognized in this regulation with respect to all land within the exterior boundaries of the reservation whether it be fee patent, tribal or trust property." *Id.* at 199, n.2.

The General Allotment Act of 1887, 24 Stat. 388 (February 8, 1887), was one of the most oppressive and destructive pieces of Indian legislation ever enacted by Congress. It stripped Indian nations of at least two-thirds of their land base and forced many Indian people into homelessness and destitution. Congress recognized its mistake and passed the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984-88 (June 18, 1934), which, among other things, ended the allotment policy. Section 5 of the IRA authorizes the Secretary of the Interior to acquire lands and land rights "for the purpose of providing land for Indians," and Section 7 authorizes the Secretary to "add . . . lands to existing reservations."[36] The Navajo People reserved to themselves a minute portion of their aboriginal homelands in the 1868 Navajo Treaty, 15 Stat. 667 (June 1, 1868). The 1868 Treaty is significant here for two reasons: it defines the original Navajo Reservation (an "existing reservation" referred to in section 7 of the IRA), and it proclaims the Navajo Nation's retained inherent sovereign authority over the exterior boundaries of its territory—then and now.

In 1934, Congress, anticipating that the IRA would restore land to existing Indian reservations and correct the abuses of the General Allotment Act, passed the 1934

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[36] To restate the obvious, the term "reservation" means lands "reserved" by Indian nations or their homelands. It does not mean (at least in the Navajo Nation context) a generous gift from the United States.

Boundary Act "[t]o define the exterior boundaries of the Navajo Indian Reservation in Arizona. . . ." 48 Stat. 960. The 1934 Boundary Act brought the Cameron area back into the territorial jurisdiction of the Navajo Nation, and included the subject fee land within the exterior boundaries of the Navajo Nation. Therefore, Atkinson's facility is located within Navajo Indian Country, which is defined as follows:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

7 N.N.C. § 254 (1995).

This definition of Navajo Indian Country is derived from the federal statutory definition of "Indian Country," 18 U.S.C. § 1151.[37] Navajo Nation Council Resolution No. CMY-28-70 (May 7, 1970). In *Ashcroft*, the court applied federal regulatory definitions of what it means to be "on" an Indian reservation or within Indian Country, and concluded that Atkinson was indeed doing business "on" the Navajo Reservation or within Navajo Indian Country. 679 F.2d at 198-200.

Indian Country includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any

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[37] The United States Supreme Court has held that this federal criminal jurisdiction statute "generally applies as well to questions of civil jurisdiction." *De Coteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). The Indian Country statute is the measure of tribal civil authority. See *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Pittsburgh & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531 (10th Cir. 1995). The Tenth Circuit Court of Appeals held in *Watchman:* The Indian Country statute "represents an express Congressional delegation of civil authority over Indian country to the tribes." 52 F.3d at 1541. Consequently, the court found that "the Navajo Nation has the authority to tax any mining activities taking place in Indian country without violating any express [federal] jurisdictional prohibitions." 52 F.3d at 1541. Accordingly, Atkinson's fee land is in the Navajo Nation, and its business activities, including the renting of hotel rooms to non-Indian tourists, takes place within Navajo Indian Country.

III.

Despite Atkinson's physical presence within the Navajo Nation, as well as the entry of non-Navajo tourists,[38] does the Navajo Nation have the lawful power to tax guests or require Atkinson to collect that tax? The Navajo Nation enjoys governmental authority over its territory, as does any sovereign. The federal courts have agreed, particularly with respect to Indian nation taxing power. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 142 ("there is a significant territorial component to tribal power . . . [including] . . . Indian taxing power..."); *Buster v. Wright,* 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) (a tribe may prescribe the terms upon which non-Indians conduct business within its borders). Thus, the general

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[38] Non-Indians are not permitted to "pass over, settle upon, or reside in" the Navajo Nation without proper authorization pursuant to Article II of the 1868 Navajo Treaty.

principle is Indian nations have the inherent power to tax using their general governmental authority, except to the extent Congress has expressly limited that power, and that governmental authority includes taxation of non-Indians who are present within Indian Country. Felix S. Cohen, *Handbook of Federal Indian Law* 431-35 (1982 ed.); *Washington v. Confederated Tribes*, 447 U.S. 134, 152-54 (1980).

In 1893, a federal appeals court considered the issue of whether the Creek Nation could use the federal courts to collect a tax it imposed on a non-Indian resident of its territory. *Crabtree v. Madden*, 54 F. 426, 428 (8th Cir. 1893). While the question of the Indian nation's authority to tax non-Indians was not before it, the court noted a "presumption" that the Creek Nation lawfully imposed its tax and had the lawful authority to collect the tax using its own remedies. *Id.* at 429. The same court ruled in a subsequent case that Indian nations have inherent authority to tax non-Indians present and doing business within its territory. *Buster v. Wright*, 135 F. 947, 950, 958.[39] There, the Creek Nation imposed a permit tax on non-Indians doing business on non-Indian fee land within the Nation's territory. *Id.* at 949-950. The court affirmed the Creek Nation's power to tax:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original

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[39] It is important to the issue before us that the United States Supreme Court cited *Buster v. Wright*, *id.*, as authority in *Washington v. Confederated Tribes*, 447 U. S. 134, 153 (a case dealing with tribes' power to tax non-Indians), and *Montana v. United States*, 450 U.S. 544, 566 (a case deciding the issue of a tribe's power over non-Indian conduct on non-Indian fee land within the borders of a reservation).

> sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

Id. at 950.

On the question of the Creek Nation's jurisdiction over the non-Indian lots, the court said, "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes. . . ." *Id.* at 951. That is because:

> Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.

Id. at 952. Despite non-Indian arguments that their businesses could not be taxed because the lots and town sites had been withdrawn from Creek Nation jurisdiction, the court applied the rule that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." *Id.* At 952. Unlike the Navajo Nation, the Creek Nation acquired its lands by "a patent from the United States," but the court deemed irrelevant the method of acquisition, because the Nation had full jurisdiction over those lands as guaranteed by its treaties with the United States. *Id.* at 952-53.

The United States Supreme Court decided the issue of the Indian nations' power to tax non-Indians in *Washington v. Confederated Tribes,* 447 U.S. 134. There, the State of

Washington contended that the Colville, Makah, and Lummi Nations had "no power to impose their cigarette taxes on nontribal purchasers." *Id.* at 152. The Court disagreed:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.[40]

Id. (citation omitted). Although fee lands were not implicated, it is significant that the Court used an historical approach to conclude that "federal law to date has not worked a divestiture of Indian taxing power." *Id.* at 152. The Court bolstered its decision by citing with approval 1881, 1855 and 1900 Attorney General opinions and consistent Executive Branch recognition of Indian nations' power to tax. *Id.* at 152-53. The Court also concluded that the power to tax, including the taxation of non-Indians, was a power under "existing law" confirmed by section 16 of the IRA. *Id.* at 153. Moreover, the Court approved a 1934 Interior Department Solicitor's opinion, *Powers of Indian Tribes*, 55 ID 14, 46 (1934), which concluded as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers, so* far as such nonmembers may

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[40] The "trust lands" qualifier is irrelevant to our case, because the court in *Ashcroft*, 679 F.2d at 200, relied on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (Montana could not tax fee land within reservation because "checkerboard jurisdiction" would result, which is contrary to statutory Indian jurisdiction law), to reject Atkinson's claims linking Navajo Nation authority solely to "Indian" lands.

accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

477 U.S. at 153 (emphasis in original).

One remaining question was the source of Indian nation taxing power: Did it hinge upon the power to exclude nonmembers from the tribe's territory or was it an inherent sovereign power? That issue was resolved in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 136-37, where the tribe imposed an oil and natural gas severance tax upon non-Indian owned oil firms that had obtained long term drilling leases for tribal land. The Supreme Court said, "[w]e disagree with the premise that, the power to tax derives only from the power to exclude." *Id.* at 137. The Court elaborated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Id. (citation omitted).

Several significant general principles on Navajo Nation taxing power can be gleaned from these Indian nation taxation cases: 1) the Navajo Nation's power to tax is an essential and inherent attribute of its original sovereignty and that power remains intact until divested by federal law; 2) the Navajo Nation's taxing power extends over its territorial jurisdiction (Navajo Indian Country), which includes trust land, allotments and fee lands; and 3) the Navajo Nation's

power to tax extends to all persons who enter its territorial jurisdiction, including over non-members who engage in activities, economic or otherwise, within that jurisdiction. We now turn to Atkinson's argument that the Navajo Nation does not have the power to "tax transactions between nonmembers on fee lands and to require nonmember businesses to collect and remit such taxes." Appellant's Brief at 6.

A.

The United States Supreme Court recently ruled that 16 *Montana v. United States*, 450 U.S. 544, provides the controlling rule of law for deciding issues similar to the one before us. *Strate, et al. v. A-1 Contractors et al.*, 520 U.S. ___, 137 L.Ed. 2d 661 (1997). The Court summarized *Montana's* general rule as follows:

> [A]bsent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 671.

Relying on *Montana*, Atkinson argues that language in section one of the 1934 Boundary Act "expressly limited Navajo control" over its fee land. That language states as follows: "All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the area [the Arizona portion of the Navajo Indian Reservation] so defined shall not be affected by this Act." We disagree with Atkinson. Congress must clearly and unequivocally state in a federal statute that it has divested an Indian tribe of its retained inherent sovereign power. See

Bryan v. Itasca County, 426 U.S. 373, 392 (1976); *State of Rhode island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994). Nowhere in the 1934 Boundary Act has Congress unequivocally expressed its intent to divest the Navajo Nation of its inherent taxing power. The United States Supreme Court's conclusion in *Washington v. Confederated Tribes* still rings true today: "The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power." 447 U.S. at 152. Also, a proper respect both for Navajo Nation sovereignty and Congress' special power in this area rejects any implication that the 1934 Boundary Act implicitly divested the Navajo Nation of its inherent taxing power. *Merrion*, 455 U.S. at 149-152.

The language in the 1934 Boundary Act that Atkinson relies on does nothing more than reserve the proprietary rights of the fee holders upon expansion of the Navajo Indian Reservation. The language does not contain any special restriction on Navajo Nation governmental power, except to protect the preexisting rights of fee patent holders. *Ashcroft* put it aptly: "This would appear to mean simply that the tracts [non-Indian fee lands within the Navajo Nation] are neither tribal nor trust property. There is no indication in the record that the tracts in question differ in any way from other non-Indian fee land within a reservation." 679 F.2d at 198, n.l. Atkinson's fee land is undistinguishable from other non-Indian fee land within Indian reservation boundaries which other cases have found to be under tribal civil jurisdiction. See, *e.g., United States v. Mazurie*, 419 U.S. 544 (1975).

B.

Montana's rule that the Court summarized in *Strate* is this:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-

> Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (citations omitted). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

Montana's rule instructs that Indian nations "retain inherent sovereign power" over non-Indian conduct on non-Indian fee land within the borders of an Indian nation if the non-Indian "enter[s] consensual relationships with the tribe or its members." 450 U.S. at 565. The Court in *Strate* listed several cases which it said qualified under the consensual relationships exception. 137 L.Ed 2d at 677-78. Two of those cases bear directly on the case before us. The first case, *Buster v. Wright*, 135 F. 947, has facts remarkably similar to ours.[41] There the Choctaw Nation imposed a permit tax on

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[41] Atkinson argues that *Buster v. Wright*, *id.*, does not support the Commission's decision because, unlike the Navajo Nation, the Creek Nation had not yet lost its inherent right to exclude nonmembers from its reservation. Therefore, the Creek Nation could condition entry and conduct of business on the reservation on the non-member's agreement to pay a required license fee. Appellant's Supplemental Brief at 8. Atkinson's argument is faulty. The Creek Nation, a tribe that did not own aboriginal lands in the Indian territory in the first place, was without power to exclude anyone who was in lawful possession of any parcel of land within any town site on its reservation. *135 F.* at 950, 952. This lack of power was immaterial because the Creek Nation's authority to tax business transactions within its borders derived from its inherent and original sovereignty. *Id.*

non-Indians conducting business on non-Indian fee lands within the Nation's jurisdiction. The court ruled that the Creek Nation had the inherent sovereign power to tax and prescribe the terms upon which non-Indians may conduct business within its borders. Apparently, the non-Indians met the consensual relationships exception when they accepted the privilege of doing business within the Creek Nation's borders. In the second case, *Washington v. Confederated Tribes*, 447 U.S. 134, non-Indians entered consensual relationships with the tribes or their members when they entered the Nations' jurisdiction to purchase tobacco products from tribal vendors. The Court found the tribal interest in raising revenues for essential governmental services "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and *when the taxpayer is the recipient of tribal services*." 447 U.S. at 156-157 (emphasis ours). The Court elaborated on what it means to be the recipient of tribal services and the concomitant need of tribes to raise revenue to fund those services in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138. The Court found Indian nation taxing power essential "to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.*

Read closely, these three cases reveal a nexus between the non-Indian activity to be taxed and the Indian nation imposing the tax. Thus, to decide whether our case qualifies under *Montana's* consensual relationships exception, we ask whether Atkinson and its guests, both of whom transact business within Navajo Nation jurisdiction, receive *benefits* from the Navajo Nation government "for which it may be taxed." *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991). Stated another way, did Atkinson avail itself "of the substantial privilege of carrying

on business" within the Navajo Nation, or did Atkinson and its guests "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society" that are assured by the Navajo Nation government? *Merrion*, 455 U.S. at 137-138 (internal quotation marks omitted). The facts in the record demand an affirmative answer.

Just like the non-Indians in *Buster v. Wright*, 135 F. 947, our case's facts show that Atkinson has availed itself of the substantial privilege of carrying on business within Navajo Nation jurisdiction. Atkinson's facility is located and operates within Navajo Nation jurisdiction or Navajo Indian Country. These facts are bolstered by the federal court's ruling that Atkinson is subject to federal laws regulating trade with Indians on Indian lands, because it operates on the Navajo Nation as an Indian trader. *Ashcroft*, 679 F.2d 196. Atkinson uses a Navajo Indian environment, including culture, Navajo employees, crafts, and other Navajo Indian trappings, to lure tourists to its facility for business purposes. While on Atkinson's property, the tourists are served by Navajo employees, who make up a majority of Atkinson's work force, to provide a distinctly Navajo flavor. Suppliers enter and drive across the Navajo Nation to bring Atkinson and its guests goods, because Atkinson has accepted the privilege of doing business on the Navajo Nation.

Moreover, a non-Indian was held to have met the consensual relationships exception simply by engaging in commercial activity with tribal members. *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982). Here, Atkinson has purchased arts and crafts from Navajo tribal members and sales have been made to tribal members. Furthermore, Atkinson has even suggested that it might be subject to Navajo Nation labor laws because it employs a large number of Navajo tribal members. Appellant's Brief at 19.

Atkinson and its guests receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government. The Navajo Nation police respond to calls from Atkinson's guests and the Cameron Trading Post and perform routine security checks on Atkinson's facility. The Navajo Nation Fire Department responds to alarms and calls from Atkinson's guests and the Cameron Trading Post. The Navajo Nation Emergency Medical Services provides medical services to Atkinson's guests when needed. The Navajo Nation Government provides other services to Atkinson and its guests including health protection through the Navajo Nation Division of Health, tourism services through the Navajo Nation Tourism Department, and as a general matter economic ventures, human resource programs, natural resource development, public safety, health services, social services, education, and legislative and judicial services.

Accordingly, we hold that the facts of this case qualify it under *Montana's* consensual relationships exception. "Under these circumstances, there is nothing exceptional in requiring [Atkinson and its guests] to contribute through taxes to the general cost of [Navajo Nation] government." *Merrion*, 455 U.S. at 138-39 (citations omitted).

The other minor issue we address is the contention that somehow tourists and Atkinson are "just passing through" and the Navajo Nation has no material interest in that activity which would justify taxation. That argument was raised in *Burlington Northern R.R.*, 924 F.2d at 902, where the Blackfeet Nation imposed a possessory interest tax upon a railroad which had a statutory right-of-way through the Nation. The court dismissed the claim finding that the Nation had a significant interest because "Burlington is the recipient of tribal services." *Id.* at 904. Nothing further need be said on this minor issue.

C.

The *Strate* decision reiterated the second *Montana* test for civil jurisdiction, namely there is tribal civil jurisdiction aside from consent where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 520 U.S. at ___, 137 L.Ed. 2d at 678 (internal quotations and citations omitted). The conduct need only "threaten" those Indian nation interests. What then are the Navajo Nation's political integrity, economic security, and health and welfare interests with regard to an Indian trading post and associated hotel operating within Navajo Indian Country?

Taxation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity. A sovereign nation that cannot raise revenues to conduct governmental operations cannot function. Aside from the need to raise revenue to fund essential governmental services, *Merrion*, 455 U.S. at 137, taxation is a method of business regulation. A hotel occupancy tax is utilized to determine and project the number of tourist visits each year. Funds are then channeled to those governmental programs which benefit tourists, including police and fire protection, medical treatment, health inspections, tourism information, tourist facilities, and others.

The economic security element is similar. The Navajo Nation is seeking self-reliance and economic security through taxation. The present national trend is to shift the financial obligations of governance and government services from the federal government to the states. Public services which were formerly provided by the federal government are now the states' responsibility. The states can readily assume those obligations because of their strong tax bases. Unlike the states, the Navajo Nation just recently began building its tax base, and the hotel occupancy tax contributes to that foundation.

The Navajo Nation's health and welfare interests are also implicated. The Navajo Nation assumed the responsibility of the Indian Health Service to assure public health in the form of housing code regulation, health inspections, and providing public health services to Atkinson's guests. The "welfare" interest is used here in the sense of protecting the public welfare, as has been previously elaborated in this opinion.

The second *Montana* exception also implicates Indian nation police power. Navajo Nation police power is the power to:

> adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.

BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Cameron, Navajo Nation (Arizona) is not a "hole" within Navajo Nation territorial jurisdiction. The Navajo Nation has responsibilities to everyone who is present within its jurisdiction. The 1868 Navajo Treaty, in Article II, reserves authority to the Navajo Nation to admit non-Navajos or not and the United States specifically agreed that no person (with certain exceptions) "shall ever be permitted to pass over, settle upon, or reside in" the reservation. If we were to accept Atkinson's argument that the Navajo Nation lacks power over it and its guests, that would compromise the "pass over" authority reserved in the Treaty. Congress chose to add the area which includes Cameron to the Navajo "Reservation" in 1934, so all the provisions of the 1868 Treaty apply to that area.

IV.

The Navajo Nation Hotel Occupancy Tax generally applies to the class of hotel-keepers within the Navajo Nation. There is no justifiable reason to exclude Atkinson's facility from the tax. It would not be fair to other places of lodgings to exclude Atkinson while it accepts all the benefits of Navajo Nation governmental services without paying its fair share of the cost. We conclude that the incidence of the Navajo Nation Hotel Occupancy Tax is primarily upon tourists within Navajo Indian Country; there is no explicit federal prohibition against taxing Atkinson's non-Indian guests; and the Navajo Nation has the power and authority to require Atkinson to collect and remit the tax. We affirm the decision of the Navajo Tax Commission.

Filed this 22nd day of August, 1997.

/s/_____
Chief Justice of the Navajo Nation

/s/_____
Associate Justice

/s/_____
Associate Justice

APPENDIX E

BEFORE THE NAVAJO TAX COMMISSION
NAVAJO NATION
WINDOW ROCK, ARIZONA

Findings of Facts and Conclusions of Law
Case No. 95-008

IN THE MATTER OF:
ATKINSON TRADING CO., INC
Taxpayer

The above-entitled matter came on regularly for hearing on July 24-25, 1995, William J. Darling, Esq., appearing for the taxpayer and Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., appearing for the Office of the Executive Director, Navajo Tax Commission. Following the close of oral testimony and the presentation of exhibits, the parties submitted posthearing memoranda in support of their respective positions.

ISSUE

Is Atkinson Trading Company subject to the Hotel Occupancy Tax on the rental of rooms in property located on non-Indian fee land within the exterior boundaries of the Navajo Nation.

DISCUSSION

In July, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT) which became effective January 1, 1993. This tax is imposed on the rental of rooms within the Navajo Nation and the hotel/motel operators are charged with the responsibility of collecting and remitting the tax to the Navajo Nation.

Atkinson Trading Company (ATC), a New Mexico Corporation, conducts a hotel operation on fee land in Cameron, Arizona. This land is surrounded by the Navajo Nation. In addition to the hotel, ATC also operates a restaurant, cafeteria, gallery, curio shop, retail store and RV park on the property. Its guests are primarily non-Indian tourists. ATC has collected and remitted the HOT since its effective date; however, it has contended at all times that under the law it was not required to do so. Initially, in August, 1993, the taxpayer filed an action in the U. S. District Court seeking a declaratory judgment against the application of the HOT to its Cameron operation. This action was dismissed so that a full adjudication of the question could first be held in the tribal forum.

Following receipt of a private letter ruling from the Office of the Executive Director of the Navajo Tax Commission holding that ATC was subject to the provisions of HOT, ATC commenced this appeal, contesting the determination of that private letter ruling.

ATC contends that under *Montana* v. *U.S.*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d. 493 (1981), the Navajo Nation has no power to regulate the activities of nonmembers on non-Indian fee land unless it comes within one or both of the two exceptions set forth in that case:

> . . . To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or

> has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566.

ATC presented testimony which showed that primarily all its guests were tourists who had traveled to Cameron by bus and who were visiting the Grand Canyon. The testimony was that while at the Cameron property they had no other contact with the Navajo Nation or its members, except for the Navajos employed at the property. The testimony showed that except for the Navajo members which it employs, ATC has a minimum amount of contact with Navajo members of the reservation, that in the past when it purchased arts and crafts from tribal members; it was in very small amounts; and, it was stated, that recently even this practice had been discontinued.

Testimony for ATC shows that it purchases electric, gas and telephone services from non-Navajo sources; that it uses water under a permit from the state of Arizona and that it has contracted with a non-Navajo company for the disposal of its solid waste.

The executive director first argues that ATC is precluded from litigating the question of whether the Navajo Nation can enforce its HOT on ATC because of a prior decision to which ATC was a party, *Ashcroft* v. *U.S. Department of Interior*, 679 F 2d. 196 (1982). In that case, the court held that ATC, even though located on fee land, was a reservation business subject to the Indian trader law and regulations. I do not believe litigation of this instant case is barred because of the principles of res judicata or collateral estoppel. The issues are not the same. In *Ashcroft*, the federal government was interpreting a federal law and the regulations promulgated thereunder as they applied to businesses located on the reservation. Here, the question is whether a tax law enacted by the tribe, not a federal law, can be enforced by the tribe on

non-members on non-Indian fee land. The tribe's status in *Ashcroft* was that of a dependent ward of the U.S., whose laws were being interpreted; in this case, the tribe is attempting to enforce the laws it has enacted in furtherance of its own self-governance and it must initially determine the extent of its taxing jurisdiction.

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, (1982), the Supreme Court discussed at length the power of Indian tribes to tax and the nature of that power. It stated:

> . . . The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Id. at p.137.

Since the Cameron Trading Post is situated entirely within the exterior boundaries of the Navajo Nation and is not an independent governing body, recognized under either federal, state or municipal law, the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i. e., within the exterior boundaries of the Navajo Nation.

Montana does not serve to limit this general power to tax which was recognized in *Merrion*. In *Montana*, the tribe sought to regulate hunting and fishing by non-Indians on non-Indian land. Here, the Navajo Nation is not attempting to regulate the conduct of ATC and its guests or the use of its

property; rather, the Navajo Nation is assessing a tax to help defray the cost of government within its jurisdiction.

Finally, even applying *Montana*, the evidence shows that the activities of ATC have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation. ATC has been adjudicated to be an Indian trader within the meaning of the federal statutes and its dealings on the Navajo Nation are subject to the requirements of that law and its regulations, all of which are aimed at protecting Indians when dealing with non-Indian traders. Police, fire and emergency medical services have been made available on various occasions to ATC and its guests. ATC and its guests enjoy the benefits of an organized society which is provided by the Navajo Nation as the primary governing body within the exterior boundaries of the Navajo Nation. The annual budget for government services on the Navajo Nation are approximately $250 million.

Having reviewed the testimony and the exhibits and the various memoranda filed by the parties, the hearing officer finds and concludes, as follows:

FINDINGS OF FACT

1. On July 30, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT), 24 N.T.C. §§ 700-741, effective January 1, 1993.

2. Pursuant to 2 N.T.C. § 3353, the Navajo Tax Commission is empowered to administer the tax laws of the Navajo Nation.

3. Atkinson Trading Company (ATC) is a New Mexico Corporation with its principal place of business in Gallup, New Mexico. Its president is a non-Indian.

4. The Navajo Nation is an Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah.

5. ATC holds certain real property which is located in Cameron, Arizona in fee simple. By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, the exterior boundaries of the Navajo Nation were confirmed and this property is completely surrounded by Navajo Nation reservation trust lands.

6. ATC operates several businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post.

7. ATC's businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon.

8. ATC's guests travel across the Navajo Nation on federal highway 89 and state highway 64 to reach ATC's property. These highways are maintained by the Arizona Department of Transportation.

9. Delivery trucks from off reservation suppliers travel across the Navajo Nation to deliver their goods to ATC's operations.

10. ATC has, approximately 120 employees, 75-80 per cent of whom are tribal member.

11. Other than Navajo Nation police and fire department officers, ATC's contact with members of the Navajo Nation on the property consists of the employment of these members, a small amount of sales to members and a small amount of purchases of arts and crafts. This latter practice was discontinued in 1995, shortly before this hearing. All arts and crafts are currently purchased from off-reservation sources.

12. The Navajo Nation Police Department is the primary law enforcement agency in the Cameron area.

13. The Navajo Nation police is the only police department which maintains a substation in the area and it routinely patrols and performs security checks of the Cameron Trading Post.

14. When the emergency number 911 is dialed from ATC, the call is forwarded to the Navajo Nation Police Department.

15. The Navajo Nation Police Department and Fire Department have responded to calls and alarms from the Cameron Trading Post.

16. The Navajo Nation Fire Department is available to anyone who calls for assistance for emergency situations located on both fee and trust land within the Navajo Nation; the Navajo Nation Fire Department has responded to calls from tourists.

17. Accidents involving non-Indian tourists have occurred at the turnoff to the Cameron Trading Post and the junction of highways 64 and 89; and, Navajo Nation police and emergency medical services have responded to these accidents.

18. A variety of health services are offered to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the Navajo Nation.

19. The Navajo Nation Division of Health offered assistance in the investigation and education of the public regarding the Hantavirus outbreak in 1994.

20. The Navajo Nation Tourism Department has used tribal funds to provide facilities at several tourist areas on the Navajo Nation for the health and safety of tourists traveling across the Navajo Nation.

21. The Navajo Nation Government expends approximately $250 million annually in funding governmental services throughout the Navajo Nation. A portion of the funds used for this purpose is obtained through federal and state programs.

22. The Navajo Nation Government funds various government activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions.

23. On July 30, 1992, the Navajo HOT was signed into law. The HOT purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation.

24. The HOT requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so.

25. The HOT is imposed on guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land.

CONCLUSIONS OF LAW

1. The HOT was properly enacted by the Navajo Nation Council and signed by the Navajo Nation President and is the statute governing this appeal.

2. The Navajo Tax Commission is the duly authorized body to administer the HOT.

3. Determinations made by the Office of the Navajo Tax Commission are presumed correct; the taxpayer must prove any asserted fact by a preponderance of the evidence.

4. The Navajo Nation, as a sovereign, may control economic activity within its exterior boundaries and may assess a tax against non-members to defray the costs of governmental services provided within those boundaries.

5. Pursuant to Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62 the exterior boundaries of the Navajo Nation were confirmed. ATC's Cameron property is within the exterior boundaries of the Navajo Nation.

6. ATC benefits from the governmental services provided generally to all persons within the exterior boundaries of the Navajo Nation. There is no showing that ATC was ever denied the governmental benefits available to others on the Navajo Nation because it is located on fee land and deals primarily with non-Indian members.

7. The tax assessed against ATC's guests and which ATC must collect and pay over to the Navajo Tax Commission is the same for all similar properties within the Navajo Nation, whether on fee or trust land.

8. That the Navajo Nation police, fire and emergency service units have responded to emergency and non-emergency situations at or near the Cameron Trading Post indicates that its activities and those of its guests do have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation.

9. That ATC was determined to be an Indian trader within the meaning of the applicable federal statute creates a presumption that its activities have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation.

10. The HOT is applicable to ATC and its properties located on fee land in Cameron, Arizona.

DATED this 15th day of November, 1995.

/s/_____
Chief Hearing Officer

BEFORE THE NAVAJO TAX COMMISSION
NAVAJO NATION
WINDOW ROCK, ARIZONA

Case No. 95-008

IN THE MATTER OF:
ATKINSON TRADING CO., INC.
Taxpayer.

ORDER

This matter having come on regularly for hearing before Henry L. Adams, Hearing Officer, on July 24-25, 1995, William J. Darling, Esq., appearing for the taxpayer and Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., appearing for the Office of the Executive Director, Navajo Tax Commission, and the Commission having reviewed the Findings of Fact and Conclusions of Law entered by the Hearing Officer,

IT IS HEREBY adjudged that the taxpayer, Atkinson Trading Company, Inc., is subject to the Navajo Hotel Occupancy Tax laws for taxable periods commencing January 1, 1993, and is properly charged with the collection and remittance of the tax to the Office of the Executive Director of the Navajo Tax Commission.

DATED this 16th day of November, 1995.

NAVAJO TAX COMMISSION

/s/_____
Chairman Joe Shirley, Jr.

/s/_____
Commissioner Victor Joe

/s/_____
Commissioner Derrick B. Watchman

/s/_____
Commissioner Elroy Drake

APPENDIX F

Title 24, Navajo Tribal Code, §§ 101 to 142

Chapter 1. HOTEL OCCUPANCY TAX

§ 101. DEFINITIONS

A. "Hotel" means a building in which members of the public obtain sleeping accommodations for consideration. The term includes a hotel, motel, tourist home, tourist court, lodging house, inn, or rooming house, but does not include a hospital, sanitarium, or nursing home.

B. "Branch" means any person owning, operating, managing or controlling any hotel.

C. "Person" means any organization, whether it be a sole proprietorship, partnership, joint venture, trust, estate, unincorporated association, corporation, or government (other than the government of the Navajo Nation), or any part, division, or agency of any of the foregoing, and an individual or group of individuals.

D. "Commission" means the Navajo Tax Commission.

E. "Fraud" has the same meaning as that established in the interpretation of Section 7206 of the United States Internal Revenue Code of 1954, as amended or renumbered.

F. "Levy" means seizure and distraint by any means.

G. "Period" means a calendar quarter or any other reporting period established by regulation.

H. "Regulations" means the regulations adopted by the Commission.

I. "Taxes" means the tax, and any interest, penalty, or costs, imposed or assessed pursuant to this chapter.

§ 102. TAX IMPOSED

A. A tax is imposed on a person who, under a lease, concession, permit, right of access, license, contract, or agreement, pays for the use or possession or for the right to the use or possession of a room or space in a hotel costing $2 or more each day.

B. The price of a room in a hotel does not include the cost of food served by the hotel and the cost of personal services performed by the hotel for the person except for those services related to cleaning and readying the room for use or possession.

§ 103. RATE OF TAX

The rate of the tax imposed by this chapter is five percent of the price paid for a room in a hotel. On January 1, 1994, the rate of the tax imposed by this chapter will increase to eight percent of the price paid for a room in a hotel.

§ 104. COLLECTION OF TAX

A branch owning, operating, managing, or controlling a hotel shall collect for the Commission the tax that is imposed by this chapter and that is calculated on the amount paid for a room in the hotel.

§ 105. EXCEPTION: PERMANENT RESIDENT

This chapter does not impose a tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days.

§ 106. EXCEPTION: NAVAJO NATION

Nothing in this chapter shall be construed as imposing a tax on the government of the Navajo Nation. For the purposes of this chapter, the term Navajo Nation does not include tribal enterprises.

§ 107. RETURN AND PAYMENT

A. On the last day of each period, a branch required to collect the tax imposed by this chapter shall pay the Commission the tax collected during the preceding period, and at the same time shall file with the Commission a return stating:

1. The total amount of the payments made for rooms at the branch's hotel during the preceding period.

2. The amount of the tax collected by the branch during the preceding period;

3. Other information that the Commission requires to be in the return; and

4. Provided, that the Commission shall be authorized to assess against a branch responsible for the collection of taxes under this chapter, and that such assessments are presumed to be correct.

B. When it appears that the return filed by a branch does not reflect the tax due under this chapter, the Commission shall assess the branch for the deficiency, interest, penalties, and costs.

C. If no return is timely filed, the Commission is authorized to make an estimate of the tax due and to assess the branch responsible for collecting the tax due under this chapter for that tax, interest, penalties, and costs. This assessment is binding on the branch unless shown to be clearly erroneous.

D. If a branch fails to provide information within its possession or control which is relevant to a determination of taxes due and which it is required to provide under this chapter, the Commission is authorized to make an estimate of the tax due and to assess the branch for that tax, interest, penalties, and costs. This assessment is binding on the branch unless it is shown that the estimate, on the basis of the best information available to the Commission, was clearly erroneous or unless the Commission for other good cause shown relieves the branch from the operation of this paragraph.

E. Any taxes assessed shall become the liability of the branch responsible for the collection of the tax on the date due. If the branch is a corporation or a trust or a part thereof, then the corporation or trust shall be liable for the taxes. If the branch is an association, joint venture, or partnership, or a part thereof, then all the associates, participants, or partners both general and limited, shall be jointly and severally liable for the taxes. Subject to alteration by agreement between them, any associate, participant, or partner shall have a right of contribution from any other associate, participant, or partner for its proportional share of taxes paid, and shall have a lien on the interest of any such other for said taxes paid.

§ 108. ADMINISTRATIVE REGULATIONS

The Navajo Tax Commission is empowered to administer this tax and, to that end, shall be empowered to adopt rules and regulations, both substantive and procedural, orders implementing its decisions, rulings, and instructions such as may be necessary to the proper and efficient administration of this chapter.

§ 109. REIMBURSEMENT FOR TAX COLLECTION

The branch required to file a return under this chapter may deduct and withhold from the taxes otherwise due to the

Navajo Nation on the quarterly return, as reimbursement for the cost of collecting the tax, one percent of the amount of the tax due as shown on the return. If taxes due under this chapter are not paid to the Navajo Nation within the time required or if the branch required to file a return fails to file the return when due, the branch forfeits the claim to reimbursement that could have been taken if the tax had been paid or the return filed when due.

§ 110. EXTENSION OF TIME

A. A branch may request an extension of time for filing a return. The request must be made to the Commission in writing on or before the due date for the return. An extension may be granted at the discretion of the Commission.

B. The extension of time for filing will also constitute an extension of time for payment, unless expressly denied by the Commission. The Commission may in its discretion condition such extension on the payment of an estimated tax or the posting of a bond or provision of other security.

§ 111. RECORDKEEPING

A. Every branch shall keep full and true records of room receipts and taxes collected for each period, in accordance with regulations and shall make these records available at the request of the Commission.

B. In the case of a branch which is part of a corporation, partnership, association or other person, separate accounting records for the person must be maintained.

C. Records required to be kept under this section must be preserved for six (6) years beyond the time payment of tax is made, or if no payment is due, for six (6) years beyond the end of the period to which the records relate.

§ 112. INTEREST IMPOSED

Annual rates of interest shall be established in regulations. Interest shall be imposed on any unpaid amount of tax from the date the payment was due, without regard to any extension of time or way of payment, to the date payment is received. Interest at a lesser rate shall be paid on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

§ 113. PENALTIES FOR FAILURE TO FILE

A. If a branch fails to file a return by the time due, a penalty of ten percent (10%) of the tax due for the period, but not less than $100, shall be assessed against the branch.

B. An additional penalty of one percent: (1%) of the tax due for the period, but not less than $100, shall be assessed for each full month the return is overdue. Provided, that the additional penalty shall not, except as to the minimum amounts, exceed twenty-four (24%) of the tax.

C. A return filed on or before an extended date for filing is timely filed.

D. For good cause shown, the Commission may in its discretion relieve the branch from all or part of the penalties imposed under this section.

§ 114. PENALTIES FOR FAILURE TO PAY

A. A branch failing to pay an amount of tax by the time due shall be assessed a penalty of five percent (5%) of the amount of the underpayment.

B. An additional penalty shall be assessed of one-half percent (1/2%) of the underpayment for each full month payment is overdue but not to exceed thirty-six percent (36%) of the underpayment.

C. An amount paid on or before an extended date for payment is timely paid.

D. For good cause shown, the Commission may in its discretion relieve the branch from all or part of the penalties imposed under this section.

§ 115. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX

A. Any branch understating the tax imposed by this chapter through negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be assessed a penalty of $250, plus twenty-five percent (25%) of the underpayment of tax.

B. If any part of an understatement of tax is shown to be due to fraud, a branch shall be assessed a penalty of fifty percent (50%) of the underpayment of tax.

C. Any person who assists a branch in the fraudulent understatement of the tax due under this chapter shall be subject to a penalty of $500, plus twenty-five (25%) of the underpayment of tax. Any liability arising under this subsection shall be assessed and collected as a tax imposed by this chapter.

§ 116. CHARGES FOR ADMINISTRATIVE COSTS

A branch failing to pay any taxes at the time due may be charged for extraordinary administrative costs incurred in collecting the unpaid amount, including attorney fees and other costs of collection outside the jurisdiction of the Navajo Nation. These charges shall be assessed unless the Commission for good cause shown relieves the branch from the operation of this section.

§ 117. FAILURE TO COMPLY WITH CHAPTER

Any branch or other person obligated to pay taxes pursuant to this chapter, to designate an individual, to file a return, to provide information or documents or allow access to equipment within its possession or control, to furnish a surety bond of other security, or to comply with a lawful order of the Commission, and failing to do the same in accordance with the provisions of this chapter and the regulations, may have its rights to engage in productive activity within all or some of the Navajo Nation suspended, until compliance is made or for such shorter time as the Commission may provide. The Commission is empowered to order such suspension, provided that it shall first give the person to be suspended notice and an opportunity to be heard under § 131(A), and that any suspension may be appealed pursuant to § 131(B).

§ 118. INTERFERENCE WITH ADMINISTRATION

A. It shall be unlawful for any person, forcibly, or by bribe, threat or other corrupt practice, to obstruct or impede the due administration of this tax.

B. It shall be unlawful for any person willfully to fail to comply with a subpoena duly issued pursuant to § 136(B).

C. It shall be unlawful for any person to commit fraud, or knowingly to assist another in the commission of fraud, with the intent to evade or defeat the assessment or collection of any taxes imposed by this chapter.

D. It shall be unlawful for any person with knowledge and intent to falsely verify by written declaration any return or document.

E. Any Indian who violates any of the provisions of this section shall be guilty of an offense and, upon conviction, shall be sentenced to a term of imprisonment of not more than

180 days, or ordered to pay a fine not to exceed $500, or both, in accordance with the provisions of Title 17, Navajo Tribal Code.

F. Any non-member of the Navajo Nation who violates any of the provisions of this section may be excluded from land subject to the jurisdiction of the Navajo Nation in accordance with the procedures set forth in 17 NNC §§ 1901-1902.

G. Any person who violates any of the provisions of this section, or whose employees or agents violate any of the provisions of this section, may have its rights to engage in productive activity within all or some the Navajo Nation temporarily or permanently suspended. The Commission is empowered to order such suspension, provided that it shall first give the branch to be suspended notice and an opportunity to be heard under § 131(A), and that any suspension may be appealed pursuant to § 131(B).

§ 119. COLLECTION POWERS

A. The Commission shall have full power to collect any taxes assessed, including the power to attach and seize, in accordance with the provisions of this chapter, the assets of a branch or any property subject to lien, and any other powers available to the Navajo Nation for collection of debts owed it.

B. The Commission may request the Attorney General of the Navajo Nation to bring suit or enforcement proceedings in any court of competent jurisdiction. Provided, that the bringing of suit or enforcement proceedings shall not constitute a waiver of sovereign immunity and further provided that the Commission shall never be compelled to assert a claim for taxes in litigation by way of counter-claim or otherwise.

§ 120. SECURITY FOR PAYMENT

Whenever necessary to secure the payment of any taxes due or reasonably expected to become due, the Commission is authorized to require the branch to furnish an acceptable surety bond in an appropriate amount, payable to the Commission and conditioned upon the payment of the taxes therein identified no later than the date on which the liability becomes conclusive, or to furnish other acceptable security in an appropriate amount, and to require the branch to furnish additional security as it becomes necessary.

§ 121. LIEN FOR TAXES

A. If a branch fails to pay any taxes after demand by the Commission, the amount shall be a lien in favor of the Navajo Nation upon all property of rights to property of those liable for collecting the taxes due under this chapter.

B. The lien shall arise at the time the demand is made, shall attach to all property then owned and thereafter acquired, and shall continue until the amount of the lien is satisfied or released, and shall be effective against related persons without notice.

C. The lien shall not be effective as against other parties until notice is recorded in the Offices of the Commission in a form available for inspection by the public.

D. Provided, that with respect to a return filed, a lien shall arise for any unpaid taxes at the time of filing without further demand, and further provided that, if a lien shall arise according to the terms of the extension or stay.

§ 122. FORECLOSURE OF LIEN

A. The Commission may foreclose upon any or all items of property or rights to property subject to a lien for taxes by levying upon the same and, where such property does not consist of money, converting the same into money by any

appropriate means including the sale thereof or the operation under receivership of the business in which the property is used. Provided, that the Commission may be regulation prescribe the circumstances in which property or rights to property subject to a lien may be retained to offset the amount due, rather than being converted into money.

B. The Commission by regulation may provide for the redemption of property levied upon, within time limits and on terms specified.

C. The effect of a levy upon any branch for obligations due or payable by a branch liable to collect the tax due under this chapter shall be continuous from the date the levy is first made until the liability out of which the levy arose is satisfied.

D. Any person in possession of or obligated with respect to property or rights to property upon which a levy has been made who upon demand by the Commission, surrenders such property or rights to property (or discharges said obligation) to the Commission, shall be discharged from any obligation or liability to the person or persons liable for collecting the tax due under this chapter whose property or rights to property were levied upon.

E. The Commission shall carry out the provisions of this section under regulations comporting with due process, and no court proceeding shall be required in order for it to do so.

F. Proceedings for the sale of property substantially in compliance with the regulations shall be effective to transfer to the purchaser all right, title, and interest therein of the branch or person whose property or rights to property were levied upon. Provided, that where required by Federal law the sale of property shall not be final without the approval of the Secretary of the Interior.

G. The Commission may delegate and empower persons to carry out the procedures of this section, including officers of the Navajo Division of Public Safety, who shall render assistance in this regard on request by the Commission.

§ 123. APPLICATION OF PROCEEDS

A. Money levied upon by the Commission, or realized from property or rights to property levied upon, shall be applied first to the expenses of the levy and proceedings for the conversion of property, and then to the liability for costs, penalties, interest, and tax, in that order.

B. The balance, if any, shall be remitted to the person or persons who have claimed and proven legal entitlement thereto, provided that the Commission may set time limits or other reasonable conditions on the making and proving of such claims.

§ 124. RELEASE OF LIEN

A. Payment of the entire liability of the branch on account of whose liability the lien arose, shall operate to release the lien.

B. The payment of any part of the liability shall operate to reduce the amount of the lien by the amount paid.

C. Where a lien has been recorded and the Commission thereafter receives all or part of the taxes giving rise to the lien, the Commission will immediately cause a notation of the complete or partial release of the lien to be made in the record.

D. The Commission may in its discretion release liens on certain property without payment of all outstanding liabilities, for good cause and where the interests of the Navajo Nation are adequately protected by other security.

§ 125. INTERFERENCE WITH FORECLOSURE

A. It shall be unlawful for any person to remove from the jurisdiction of the Navajo Nation any property on which there is a lien for taxes which is effective against that person pursuant to § 121.

B. It shall be unlawful for any person in possession of or obligated with respect to property or rights to property which have been levied upon, to fail to surrender such property or rights or to discharge such obligation upon demand by the Commission therefor, except as to any part of the property or rights as is, at the time of the demand, subject to an attachment or execution under any judicial process.

C. Any person violating the provisions of this section shall be personally liable for the value of the property removed or not surrendered, or for the amount of the obligation not discharged, not exceeding the amount for which the levy was made. Any liability arising under this section shall be assessed and collected as a tax imposed by this chapter.

§ 126. TRANSFER OF BUSINESS

A. If a person buys substantially all of the assets of a branch within the Navajo Nation, that person shall withhold from the purchase price and pay to the Commission the amount of taxes due on account of activities of the branch prior to the purchase.

B. Any buyer failing to withhold taxes shall be personally liable up to the value of all the property acquired. Any liability arising under this section shall be assessed and collected as a tax imposed by this chapter.

C. The buyer shall make a written request and, within 30 days after the owner's records are made available for audit, the Commission shall send a notice to the buyer for the taxes due. Thereafter, the buyer shall not be personally liable under

this section for any taxes in excess of the amount stated in the notice, or for any such taxes if no notice is given within the time required.

D. No consent to the assignment or transfer of any lease or other rights to engage in productive activity within the Navajo Nation shall be granted by the Navajo Nation unless the Commission first certifies that taxes arising from said activity have been paid, or that payment has been adequately secured.

§ 127. MUTUAL ASSISTANCE AGREEMENTS

The Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon approval of the Intergovernmental Relations committee of the Navajo Nation Council.

§ 128. PROHIBITION OF SUITS

No suits for the purpose of restraining the assessment or collection of the taxes imposed under this chapter shall be maintained in any court by any person, whether or not such person is the person against whom such taxes assessed.

§ 129. STATUTE OF LIMITATIONS

A. Taxes imposed and required to be collected by this chapter shall be assessed within six (6) years after the return was filed, except as provided in subsections (B) and (D) of this section.

B. In the case of a fraudulent return with the intent to evade tax, no period of limitations shall apply.

C. Any action in a court or by levy for collection of taxes imposed under this chapter must be commenced within six (6) years of the assessment, except as provided in subsections (D) and (E) of this section.

D. The running of the period of limitations provided in subsections (A) and (C) of this section is suspended during any period the Commission is prohibited by any court from making an assessment or commencing collection proceedings and during any period of appeal under § 131.

E. The running of the period of limitations for collection may be suspended for any period agreed upon between the person and the Commission.

§ 130. PROCEDURE FOR REFUNDS

A. Any branch believing it has made an overpayment of taxes, within one (1) year after the time the alleged overpayment was made, may file a written claim for refund with the Commission. Provided, that it shall not be necessary to file a claim if the basis therefor has already been established under an abatement or asserted in an appeal under § 131, and further provided that an issue determined pursuant to an appeal may not be reopened by the filing of a claim for refund.

B. If an overpayment arises as a result of an action of a Navajo Nation, Federal, or state agency, or any court other than in an appeal under §131(B), wherein the action changes the factual basis upon which taxes were determined and paid, the time for filing a claim for refund shall be one (1) year from the date of such action.

C. The Commission shall rule on claims for refund according to procedures established in regulations. If a claim is denied in whole or in part, the branch may appeal pursuant § 131.

D. If the Commission determines, either on a claim for refund under this section, or in an appeal under § 131(A) on a claim or from an assessment, from which action no appeal is taken, that a branch has made an overpayment, the

Commission shall refund the overpayment, with applicable interest, to the branch.

E. Where the action of the Commission on a claim for refund under this section, or in the appeal under § 131(A) on a claim or from an assessment, is then appealed, the Commission shall make a refund of the overpayment determined by the order in that appeal, plus the applicable interest.

F. Provided, that if the branch entitled to a refund owes unpaid taxes, the refund shall be offset and reduced by such unpaid amounts.

G. Where an overpayment occurred through mathematical error, or other mistake, or verifiable change of fact, and within the times allowed under subsections (A) and (B) of this section, the Commission by form or regulation may provide for a credit by offset in a current period.

H. No refunds or credits for taxes paid shall be made or allowed to any branch by any court or agency other than as provided in this section, except that the Commission may by form or regulation provide for a refund or credit where taxes paid for one period thereafter requires adjustment on account of another tax for a concurrent period which is later determined and paid.

§ 131. PROCEDURE FOR APPEAL FROM ASSESSMENTS AND ACTIONS

A. Appeals from assessments and denials of refund shall be made first to the Commission according to procedures established in regulations. The Commission may permit or require one or more levels of review by its employees or delegates and may provide for hearings before hearing officers instead of or in addition to hearings before the Commission as a body, but the decision or recommendation of a hearing officer will be binding only to the extent adopted

by the Commission as a final decision. The failure duly to proceed to a next required level of review under this subsection shall constitute a waiver of any further appeal pursuant to this subsection or subsection (B).

B. Appeals from final actions of the Commission, including but not necessarily limited to assessments, denials of refund, and suspension orders, shall be made only to the Supreme Court of the Navajo Nation, according to procedures established in regulations, but in no case may an appeal of an assessment be taken to the Supreme Court until payment of the taxes assessed has first been made. Review of Commission actions in the Supreme Court shall be on the record made in the Commission and not de novo, and shall be limited to the determination whether the action of the Commission was not supported by the evidence, or was arbitrary, capricious, an abuse of discretion, beyond its authority, or otherwise contrary to applicable Navajo Nation or Federal law; except that were affirmation of the action would suspend a right of an appellant to engage in productive activity within the Navajo Nation, the appellant shall on request be entitled to a hearing *de novo* on any material question of fact. The Supreme Court shall be empowered to affirm, reverse, or modify a Commission action, or to remand the matter to the Commission for further action, and it may stay the effect of an order suspending a right to engage in productive activity, pending the appeal.

C. Procedures for staying the payment of taxes which are being appealed under Subsection A of this section may be established in regulations. The Commission in its discretion may condition the grant of a stay on the posting of a bond or provision of other security, or on the creation of a lien.

D. The Courts of the Navajo Nation are vested with jurisdiction: (1) over any and all persons subject to this chapter; and (2) to hear and determine any challenge to the validity of this chapter, either generally or as applied to any

person, provided that the provisions of this section and the regulations hereunder are complied with.

§ 132. ABATEMENT AUTHORITY

A. In response to a written request for abatement, but before any court acquires jurisdiction in the matter, or when an assessment is found to be incorrect, the Commission may abate any part of the assessment determined to have been incorrectly, erroneously, or illegally made.

B. Upon a compromise of liability and according to the terms of the closing agreement formalizing the compromise, the Commission shall cause the abatement of the appropriate amount of the assessment.

C. Abatements in excess of $1,000 shall be recorded in the offices of the Commission in a form available for public inspection. The record shall be maintained for a minimum of six (6) years after the date of abatement.

§ 133. CLOSING AGREEMENTS

A. If at any time after a final assessment of taxes, the Commission in good faith is in doubt of the liability of the person for the payment thereof, it may compromise the liability by entering in writing with the person a closing agreement that adequately protects the interests of the Navajo Nation, provided that such agreement shall be subject to approval by the Attorney General of the Navajo Nation.

B. If entered into after any court acquires jurisdiction of the matter, a closing agreement shall be part of a stipulated order or judgment disposing of the case.

C. As a condition for entering into a closing agreement, the Commission may require the provision of security for payment of any taxes due according to the terms of the agreement.

D. A closing agreement is conclusive as to the liability or nonliability for payment of taxes relating to the periods referred to in the agreement, except upon a showing of fraud, malfeasance, or misrepresentation or concealment of a material fact.

§ 134. CONFIDENTIALITY RULES

A. It shall be unlawful for any employee or former employee of the Commission to reveal to any individual, other than another employee or legal counsel of the Commission, any information contained in the return of any branch or any other information about any person acquired as a result of his or her employment by the Commission, except:

1. To an authorized representative of the branch;

2. To an employee of the government of the Navajo Nation or a member of the Navajo Nation Council authorized by the Commission to obtain information for use in connection with the governmental function of said employee or council member, provided that it shall be unlawful for the employee or council member to reveal said information except as permitted in this section;

3. To an authorized representative of another Indian tribe or a state, provided that the receiving tribe or state has entered into a written agreement with the Commission to use the information for tax purposes only and that the receiving tribe or state has enacted a confidentiality statute similar to this section;

4. To an authorized representative of a Federal agency, pursuant to the terms of a reciprocal agreement for the exchange of such information;

5. In an administrative or judicial proceeding to enforce any act or collect taxes, or in any matter in which the branch has put its own liability for taxes or the amount thereof at issue;

6. In compliance with the order of any court of competent jurisdiction in which the information sought is material to the inquiry;

7. In recording tax liens the property of a branch or collecting taxes by levy upon the property or rights to property of a branch;

8. In statistical releases not identifying the information provided as applicable to any single person;

9. To the extent of revealing whether a branch has or has not made a designation (and, if so, the name and address of that designee), or whether a person is or is not a designee (and, if so, by whom he has been designated); and

10. To the extent of revealing to the purchaser or intended purchaser of a branch or the property thereof the amount and basis of any unpaid taxes for which the seller is liable.

B. For purposes of this section, "employee of the Commission" shall include any person for whose services the Commission has contracted, provided that such person shall agree in the contract for services to abide by the provisions of this section.

C. Any employee or council member who violates any of the provisions of this section shall be subject to a fine of $50, or suspension for 30 days, or both.

D. The Commission may further restrict the disclosure of information and provide for compliance with the provisions of this section.

§ 135. EFFECTIVE NOTICE

A. Notice required to be given by the Commission may be effectively given to a person by mailing the notice to the individual last designated by the person, at the address shown

on the designation. Where a branch has not designated an individual, notice may be effectively given by mailing the notice to a person who is lessee, permittee, or assignee of property on which the productive activity at issue is conducted, or to a person holding a permit or license for the conduct of said activity. The foregoing is not intended to exclude the use of other methods of providing notice, including publication, so long as comporting with due process.

B. Public notice of a lien shall be effective as to all property and rights to property of a branch, business, or person so long as the description of the branch, business, or person is sufficient to put a reasonable person on inquiry to ascertain the existence of a lien on the property of said branch, business, or person.

§ 136. INVESTIGATIVE AUTHORITY

A. For the purpose of enforcing the provisions of this chapter, the Commission is authorized to inspect property, to examine and require the production of any pertinent records, books, information, or evidence, and to require the presence of any person and require testimony under oath concerning the subject matter of an inquiry, and to make a permanent record of the proceeding.

B. As a means for accomplishing the foregoing, the Commission is hereby vested with the power to issue subpoenas and summonses, pursuant to regulations comporting with due process.

§ 137. OATHS AND AFFIRMATIONS

Any agent or employee designated by the Commission for that purpose is authorized to administer such oaths or affirmations and to certify to such papers as may be necessary under this chapter or the regulations.

§ 138. RECEIPTS; DISBURSEMENTS

A. There is created in the treasury of the government of the Navajo Nation the Tax Administration Suspense Fund.

B. All money received by the Commission as taxes shall be deposited forthwith to the credit of said Fund.

C. Payment of claims for refund shall be disbursed from this Fund, except to the extent that there is a pertinent escrow established pursuant to subsection (E) of this section.

D. At the end of each month, the balance remaining in the Fund, after the payment of refunds under subsection (C) of this section, shall be transferred to the general fund or to such other funds or the credit of such accounts, as may be provided by Navajo Nation law.

E. Notwithstanding the foregoing, the Commission may in its discretion hold certain contested amounts in escrow, or direct some balance to be maintained in the tax Administration Suspense Fund from month-to-month in anticipation of additional payments which may have to be made therefrom.

§ 139. SEVERABILITY

If any provision of this chapter, as amended, or its application to any person or circumstance, is held invalid by a final judgement of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid

provision or application, and to this end the provisions of this chapter are severable.

§ 140. EFFECTIVE DATES

This chapter shall take effect upon approval by the Navajo Nation Council. The tax imposed by this chapter shall be due and payable for calendar quarters beginning January 1, 1993.

§ 141. REPEALS

All laws or parts of laws (or attachments thereto) which are inconsistent with the provisions of this chapter are hereby repealed, including, without limitation, any law purporting to waive any right of taxation by the Navajo Nation.

§ 142. ALLOCATION

A. The tax imposed by this chapter is imposed for the purposes of promoting tourism and tourism development.

B. To accomplish this end, this tax shall be retained in a special fund entitled the "Navajo Nation Tourism Fund" which shall be administered by the Navajo Tourism Department, and which shall, consistent with the laws of the Navajo Nation and utilizing the prudent person rule, be applied for the advancement of local tourism promotion, and to develop projects throughout the Navajo Nation. The Division of Economic Development and the Navajo Tourism Department, in compliance with the authority of the Economic Development Committee of the Navajo Nation Council and all other Navajo Nation laws, are hereby authorized to develop and recommend to the Budget and Finance committee of the Navajo Nation council the Fund's management plan. The development of said fund's management plan is not intended to convey appropriation authority to the Budget and Finance Committee of the Navajo Nation Council.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 99-126-BLG-JDS

GORDON ROSE AND JUNE ROSE, d/b/a QUILL GORDON FLY FISHERS BIG HORN COUNTY OUTFITTER, INC.; RECREATION DEVELOPMENT SYSTEMS, INC.; JOE S. BASSETT d/b/a SCHIVELY RANCH; MIRACLE TRUST, d/b/a LITTLE BIG HORN CAMP; AND BIG HORN BUSINESS ASSOCIATION, INC.,

Plaintiffs,

vs.

DENIS ADAMS, TAX COMMISSIONER OF THE CROW TRIBE; TYRONE TEN BEAR AND STEVE STEVENS, MEMBERS OF THE CROW TRIBAL TAX COMMISSION,

Defendants.

ORDER

* * * * *

Pending before the Court are cross-motions for summary judgment.

Background

This action was initiated by non-Indian individuals and non-Indian entities who own and operate businesses located on fee land within the exterior boundaries of the Crow Indian Reservation. Plaintiffs content that the Crow Tribe lacks civil authority to levy, assess, and collect a four percent (4%) resort tax on their respective businesses. They seek equitable relief to prohibit the Tribe from levying, assessing, and

collecting the tax. they also request a refund of all resort taxes paid under protest.

Plaintiffs in this case originally filed an action challenging the tax in Crow Tribal Court. After a four-day trial in January and February of 1997, the Crow Tribal Court issued findings of fact, conclusions of law, and final judgment, upholding the tax. On December 30, 1999, the Crow Tribal Court of Appeals affirmed the trial court. Thus, as defendants recognize, plaintiffs have exhausted their tribal court remedies and this case is ripe for review.

All of the plaintiffs in this case are non-Indians who own and operate recreation-oriented businesses on fee land within the exterior boundaries of the Crow Indian Reservation. Plaintiff Gordon Rose manages Quill Gordon Fly Fishers, a retail fishing shop that also provides lodging and guiding services. Plaintiff Joe Bassett owns Schively Ranch, a guest ranch located on fee land. Big Horn County Outfitters, Inc., is a retail fishing store that also provides lodging and guiding services. Recreation Development, Inc., is hunting and fishing lodge that sells fishing equipment and provides guiding services for fishing and bird hunting. Miracle Trust, doing business as Little Big Horn Camp, is a campground, motel, grocery store, gas station, and laundromat.

The Crow Tribe seeks to impose a four percent (4%) resort tax on the plaintiffs' "gross receipts from all goods and services sold or used on the Reservation in connection with the resort business." This is not an unfamiliar issue for the Court and one which the Court believes is controlled by its recent decision in *In re Haines*, 245 B.R. 401 (Mont. 2000) and the Ninth Circuit's opinion in *Big Horn County Electric v.* Adams, 2000 WL 966943 (9th Cir. June 14, 2000)

Discussion

In *Big Horn County Electric*, a case involving the Crow Tribe's attempt to tax nonmember property on the equivalent of non-Indian fee land, the Ninth Circuit recently reaffirmed a principle that this Court has long held true; that "post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land . . . ." *Big Horn County Electric*, 2000 WL 966943, p. 4. Indian tribes retain the inherent sovereign power to tax. *See*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 477 U.S. 134, 152-54 (1980) (hereafter "Colville"). However, as a general rule "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). The general rule is subject to the following two well-known exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted] A tribe may also retain power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66. The above-stated principles were reiterated in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), where the court again recognized that,

> Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe." [*Montana*, 450 U.S. at 565].

As *Big Horn County Electric* instructs, the inherent sovereign power of an Indian tribe to tax nonmembers is not exempt from this general rule and its exceptions.

In this case, as they have in past tax cases, the defendants rely heavily upon *Colville* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Ninth Circuit recognizes that while *Merrion* and *Colville* "contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Big Horn County Electric*, 2000 WL 966943, p. 6. With respect to *Colville* "it directly addresses only Indian taxation power over transactions occurring on Indian land and in *dicta* appears to support *Montana*'s conclusion that tribal taxation power over property located on non-Indian feel land is extremely narrow." *Id.* Likewise, "*Merrion* actually lends support to *Montana*'s application" . . . "because to the extent it expresses an opinion about a tribe's taxation of property located on non-Indian fee land, its language indicates that such a tax would be an impermissible extension of tribal jurisdiction." *Id.*

The defendants' position is based upon the erroneous assumption that a nonmember is subject to the Tribe's jurisdiction simply because the nonmember does business within the exterior boundaries of the reservation, even if the business is conducted on nonmember fee land and does not significantly involve the tribe. As this Court has previously recognized in *Haines*, this position is tantamount to permitting the exercise of the Tribe's inherent sovereign power over the various nonmember plaintiffs simply by virtue of their status as landowners within reservation boundaries. *Montana* and its progeny specifically prohibit such exercise of sovereign power.

In its opinion, the Crow Tribal Court of Appeals indicates that the starting point should not be a list of limitations on tribal powers, but instead should be an assumption of the breadth of tribal powers which remain in place unless

specifically limited by Congressional enactment or treaty, or when inconsistent with tribal sovereign status. When determining the extent to which a tribe can exercise its inherent civil authority over nonmembers, on non-Indian fee land, this is an incorrect assumption. To the contrary, the general rule is that absent express authorization by federal statute or treaty, the inherent sovereign powers of a tribe extend to nonmembers only in limited circumstances.

The Crow Tribal Court of Appeals found that the tribal taxation issue is not readily addressed by *Montana* and *Strate* because the Crow resort tax is imposed on reservation-wide activities. The court noted that to attempt to parse the matter down to whether or not a particular taxable activity or event occurs on a fee or trust land ultimately would have the effect of undermining tribal taxation authority because it would restrict in type or breadth what could be considered valid tax. This Court disagrees with the Crow Tribal Court of Appeals' assertion that tribal taxation is not readily addressed by *Montana*. *Montana* is the path-marking case concerning the extent to which tribes can assert civil authority, including taxation, over nonmember on nonmember fee lands. The Ninth Circuit has specifically recognized that *Montana*'s framework applies in determining a tribe's jurisdiction to tax nonmembers on non-Indian fee land.

The Crow Tribal Court of Appeals was also concerned that the test set forth in *Montana* may have the effect of undermining tribal taxation authority because it would restrict the breadth of what could be considered valid taxation. The test for determining whether or not a tribe can exercise civil authority and tax a nonmember is not, and cannot, be dependent upon the restrictive effect the test may have upon the authority to tax. The defendants cannot ignore a Supreme Court articulated jurisdictional test simply because they do not like the effect of the test on their ability to impose a tax

on nonmembers. The jurisdictional test proposed by the Crow Tribal Court of Appeals was in error.

In applying *Montana*'s framework, this Court must first determine whether nor not there are any treaties or statutes which afford the Tribe the ability to tax the plaintiffs. Defendants have alerted the Court to no such treaties or statues, nor is the Court aware of any. Unless the defendants can establish one of the exceptions delineated in *Montana*, the activities of the plaintiffs on their respective fee lands are not within the Tribe's jurisdiction.

The first exception allows the Tribe to exercise civil authority over the activities of nonmembers who enter into consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements. In this case the defendants cannot point to, nor does there exist, any consensual relationship between the plaintiffs and the Tribe or its members which would allow the Tribe to tax transactions between nonmembers and the plaintiffs which occur on plaintiffs' non-Indian fee land.

In the past the defendants have argued that customers of the plaintiffs have engaged in consensual relationships with the Tribe by virtue of their voluntary presence on the reservation and their enjoyment of the benefits provided by the Tribe and funded by tax revenues. This Court rejected such argument because; (1) simple presence of the plaintiffs' customers on the reservation does not constitute a consensual relationship between the customers and the Crow Tribe and (2) the relationship, if any, between plaintiffs' non-Indian customers and the Crow Tribe is immaterial to whether the Tribe can assess and collect a tax from the plaintiffs for activities which occur on the plaintiffs' non-Indian fee land. For the Tribe to assert civil authority over the plaintiffs there must be a consensual relationship between the plaintiffs and the Tribe.

Even assuming the existence of a consensual relationship between plaintiffs' non-Indian customers and the Crow Tribe, taxing transactions between non-Indian customers and the non-Indian plaintiffs which take place on non-Indian fee land exceeds the inherent sovereign authority of the Tribe because the exercise of such authority extends only to regulation of the particular conduct, activity, or trade that gives rise to the consensual relationship between the Tribe and the nonmember. While non-Indian customers who enter tribal lands may have submitted to the Tribe's jurisdiction, with respect to activities on their non-Indian fee land, the plaintiffs have not.

Defendants again argue that the resort tax is valid because the plaintiffs do business "on the reservation" and the plaintiffs and their customers "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137. The premise of this argument is that nonmembers should pay taxes to defray the cost of governmental services provided by the tribe because the nonmembers enjoy the benefits of such services. As this Court has previously recognized in *Haines*, the Tribe does not provide any significant governmental services. Instead, the vast majority of those services are provided, and paid for, by the Bureau of Indian Affairs, Indian Health Services, and other federal and county agencies. In response, the defendants and both Crow Tribal Courts are of the opinion that services provided, and paid for, by these "trustee agents" should be considered as services provided by the Tribe. It makes little sense to allow the Tribe to collect taxes to defray the cost of governmental services when those services are not being provided, or paid for, by the Tribe.

Moreover, as this Court has also previously recognized in *Haines*, the "advantages of a civilized society" argument

requires that the nonmember first be within the tribe's jurisdiction before the tribe can exercise its inherent sovereign authority to tax. This theory is not a jurisdictional test, but is instead simply a recognition of the source of the tribe's inherent sovereign power to tax once jurisdiction over a nonmember has been established. To establish jurisdiction the Court must apply *Montana*.

The second exception allows a tribe to exercise civil authority over the conduct of non-Indians on fee lands when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. The crow Tribal court and Court of Appeals determined that the resort tax is needed to defray the impact of tourism; the costs of providing services that benefit tourists; and the costs of remedying the impact of tourism. Essentially this is the advantages of a civilized society argument in disguise. In *Haines* the same argument was raised. As this Court previously determined, in order for the tribe to be able to exercise its sovereign authority to tax the plaintiffs, the tribe must show that the plaintiffs' sales to nonmembers, not their failure to pay the tax, threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Plaintiffs' sales to other nonmembers, occurring on nonmember fee lands, do not. the direct effect on the political integrity, economic security, health or welfare of the tribe is a prerequisite to the tribe's ability to exercise its sovereign power over a nonmember. The Tribe cannot first impose a resort tax and then attempt to justify the tax based upon the purported effect on the Tribe of the plaintiffs' failure to pay the tax.

Moreover, in *Big Horn County Electric,* the Ninth Circuit rejected the tribal officials claim that the utility tax was justified because "the revenues created by the utility tax finance important tribal services and are, therefore, essential to the continued well-being of the Tribe." *Big Horn County*

Electric, 2000 WL 966943, p. 5. The Court of Appeals wrote "to expand *Montana*'s second exception would effectively swallow *Montana*'s main rule, because virtually any tribal tax would then fall under the second exception, a result that the Supreme Court has never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited." *Id.*

Plaintiff's request for a refund of taxes paid under protest must, however, be denied. *Big Horn County Electric*, 2000 WL 966943, p. 9-10.

Based upon the foregoing, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is granted. For all the reasons set forth herein the Crow Tribe lacks civil authority to levy, assess, and collect the Resort Tax on plaintiffs' transactions with nonmembers, occurring on non-Indian fee land.

IT IS FURTHER ORDERED that the defendants, their successors, and anyone acting in concert with the defendants, are permanently enjoined from enforcing, levying, assessing, or collecting the Resort Tax from plaintiffs based upon transactions with nonmembers which occur on non-Indian fee land.

IT IS FINALLY ORDERED that plaintiffs' motion is denied to the extent plaintiffs seek a return of taxes paid under protest.

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE AND DATED this 7th day of August, 2000.

/s/_____
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CV 99-126-BLG-JDS

GORDON ROSE & JUNE ROSE *et al.*,
Plaintiffs,

vs

DENIS ADAMS, TAX COMMISSIONER
OF THE CROW TRIBE, *et al.*,
Defts.

JUDGMENT

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Plaintiffs' Motion for Summary Judgment is granted. The Defendants, their successors, and everyone acting in concert with the defendants are permanently enjoined from enforcing, levying, assessing or collecting the Resort Tax from Plaintiffs based upon transactions with nonmembers which occur on non-Indian fee land.

FURTHER ORDERED that Plaintiffs' Motion is denied to the extent Plaintiffs seek a return of taxes paid under protest.

August 7, 2000

Lou Aleksich, Jr.
CLERK

(By) DEPUTY CLERK

APPENDIX H

Selected Tribal Tax Provisions

EASTERN BAND OF CHEROKEE TRIBAL CODE, CHAPTER 10 (TAXATION)

Section 105-30. Imposed.

A Privilege Tax is imposed on the operators of hotels, motels, tourist homes, tourist camps, campgrounds, rental cabins, and similar type businesses and persons who rent private residents and cottages to transients. This tax shall not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging or accommodations supplied to the same person for a period of 90 or more continuous days. This tax shall be in addition to any sales tax or levy now or hereafter imposed. (Ord. No. 317, 1-5-1995)

Section 105-31. Rate.

(a) The Privilege Tax for hotels, motels, tourist homes, residences and cottages shall be $1.00 for each room for every day or night it is rented.

(b) The Privilege Tax for tourist camps and campgrounds shall be $0.25 for each site for every day or night it is rented.

(Ord. No. 317, 1-5-1995)

* * * *

CROW TRIBAL CODE TITLE XIII (TAXATION)

Chapter 2 (Railroad and Utility Tax)

Section 203. Tax Imposed.

A. There must be a tax levied on all utility property located on tribal lands within the exterior boundaries of the Crow Reservation or used on tribal lands within the exterior boundaries of the Crow Reservation plus all utility property located on trust lands in the ceded strip which are considered part of the Crow Reservation.

B. The amount of the tax imposed each year shall be 3% of the assessed value of the utility properties subject to the tax. Any change in this rate shall not apply retroactively to a year prior to the year in which the change is approved.

* * *

Chapter 4 (Resort Tax)

4.01 Definitions.

For the purposes of this chapter, unless otherwise required by the context, the following definitions apply:

(a) "Resort business" includes any activity engaged in by any person or caused to be engaged in by a person with the object of gain, benefit or advantage, either directly or indirectly, and which involves providing goods or services to tourists or transient visitors to the Crow Indian Reservation. Resort businesses include, but are not limited to:

> (1) Campgrounds, dude ranches, guest ranches, hunting and fishing lodges, bed and breakfast establishments, souvenir shops, hotels, motels, and other lodging or camping facilities; and

(2) Hunting and fishing guide services and recreation equipment rentals received or used on the Reservation.

* * * *

4.02 Tax Imposed.

A tax is hereby imposed on the gross receipts from all goods and services sold or used on the Reservation in connection with a resort business.

4.03 Tax Rate.

The tax shall be at a rate of 4% of the gross receipts from all goods and services sold or used on the Reservation in connection with a resort business.

* * * *

THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION TRIBAL TAX CODE

Section 701. Statement of Purpose. Pursuant to the provisions of Chapter 1 of this Code, it is the policy of the Three Affiliated Tribes of the Fort Berthold Reservation to provide their members and non-members residing, doing business, or working within the jurisdiction of the Tribe with essential governmental services. To finance this governmental policy, the Tribe adopts in this Chapter a possessory interest tax, which will provide the Tribe with a portion of the revenues necessary to fund essential governmental services within their jurisdiction boundaries and which will benefit all individuals and businesses on the Reservation.

Section 702. Short Title. The tax levied by this Chapter shall be called the "Possessory Interest Tax" of real and personal property, which includes any right or interest, and actual ownership obtained in a tract of land, (trust, restricted or fee land), within the boundaries of the Fort Berthold Reservation (by lease, permit, contract, easement, right-of-way, deed, or other agreement). which authorizes a person . . . to use that real and personal property for business . . . , profit, or use, except as otherwise exempted Section 108 of this Code.

* * *

Section 705. Imposition and Rate of Tax. The Possessory Interest tax set forth herein shall be imposed on the ownership of possessory interest on January 1st of each year and shall be assessed at the rate of one percent (1%) of the assessed value of the possessory interest as determined and appraised in accordance with approaches/methodologies as utilized in Section 706.5 . . . .

* * * *

ASSINIBOINE & SIOUX TRIBES OF FORT PECK RESERVATION TRIBAL TAX CODE

Section 301. Definitions.

For purposes of this Chapter, unless the context specifically requires otherwise:

(a) "Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.

* * *

Section 303. Tax Imposed.

A tax of three percent (3%) of the value on each assessment date of all utility property is hereby imposed, provided however that all cooperative rural electrical or cooperative rural telephone associations organized and operated not for profit shall pay a tax of one percent (1%) of such value.

* * * *

BLACKFEET TRIBAL ORDINANCE PROVIDING FOR A POSSESSORY INTEREST TAX. NUMBER 80, AS AMENDED BY RESOLUTION NO. 213-87 (1987)

* * *

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

* * *

Section 11. EXEMPTIONS.

1. No possessory interest which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

* * * *